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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LANE CARTER, in his official capacity as Sheriff of Moore County, RANDALL BUTLER, in his individual and official capacity as a Deputy with the Moore County Sheriff's Office, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Petitioners,

v.

CODY HASTINGS MASSASOIT, Executor for TALLAS HASTINGS TOMENY, Deceased, and STEPHEN PHELPS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES R. MORGAN, JR.
WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company
One West Fourth Street
Winston-Salem, NC 27101
(336) 721-3710

Counsel for Petitioners

214513

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Under clear United States Supreme Court authority, a law enforcement officer sued under 42 U.S.C. § 1983 for excessive force is entitled to qualified immunity if a reasonable officer on the scene could have believed that the use of force was reasonable under the circumstances. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001); *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The United States Supreme Court has made it crystal clear that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and that Courts must not engage in "20/20 . . . hindsight." *Saucier*, 533 U.S. at 204-205, 121 S.Ct. at 2158; *Graham*, 490 U.S. at 396-97, 109 S.Ct. at 1872. Yet, in the Fourth Circuit's panel opinion, the panel analyzed the reasonableness of the force from the perspective of the plaintiffs, not from the perspective of a reasonable officer on the scene. Moreover, the Fourth Circuit panel analyzed the use of force using the "20/20 vision of hindsight." In light of this, the questions presented here are:

(1) Is Deputy Butler entitled to qualified immunity in this case because, in light of the tense, uncertain, and rapidly evolving circumstances facing him, Butler's use of deadly force was reasonable?

(2) Is Deputy Butler entitled to qualified immunity because, in light of the tense, uncertain, and rapidly evolving circumstances facing Butler, a reasonable officer on the scene could have believed that Butler's use of deadly force was reasonable?

PARTIES TO THE PROCEEDING

Petitioners: Randall Butler was a Moore County, North Carolina Deputy Sheriff at the time of the February 23, 2002 incident in question and was a defendant/appellant before the Fourth Circuit. Sheriff Lane Carter is the elected Sheriff of Moore County, North Carolina and was a defendant/appellant before the Fourth Circuit. The Fidelity and Deposition Company of Maryland, a Maryland corporation, is the surety on Sheriff Carter's official bond required under North Carolina statutory law, and was a defendant/appellant before the Fourth Circuit. In accordance with Supreme Court Rule 29.6, Fidelity and Deposition Company of Maryland is a wholly owned subsidiary of Zurich American Insurance Company.

Respondents: Cody Hastings Massasoit, executor for the estate of Tallas Hastings Tomeny, deceased, and Stephen Phelps are the respondents herein and were the plaintiffs/appellees below.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' opinion is set forth as *Massasoit v. Carter*, Slip Copy, 2007 WL 3390462 (C.A.4 (N.C.)). This unpublished opinion, filed on November 15, 2007, is found in the Appendix to this Petition ("App.") at 1a. The Fourth Circuit's Order denying petitioners' motion for rehearing and rehearing en banc, filed on December 10, 2007, is also unpublished. App. 59a. The memorandum opinion and order of the United States District Court for the Middle District of North Carolina granting defendants' motion for summary judgment in part and denying it in part is reported at *Massasoit v. Carter*, 439 F.Supp.2d 463 (M.D.N.C. 2006). App. 6a.

STATEMENT OF JURISDICTION

The opinion and judgment of the Fourth Circuit was entered on November 15, 2007. App. 1a. A timely motion for rehearing and rehearing en banc was filed on November 29, 2007. On December 10, 2007, the Fourth Circuit Court of Appeals issued its order denying rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents Massasoit, as executor of the estate of Tallas Tomeny, and Phelps seek damages for alleged violation of their Fourth Amendment rights pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

This is a Fourth Amendment civil rights use of force case involving a deputy sheriff's use of deadly force against two criminal suspects whom he reasonably believed were armed and whom he perceived were behaving aggressively toward him, including their attempting to bring firearms to bear against him. In reality, the criminal suspects were U.S. Army Special Forces soldiers in disguise who were participating in an elaborate military role-play exercise in rural Moore County, North Carolina. The soldiers, decedent Tallas Tomeny and respondent Stephen Phelps, who were carrying an M-4 assault rifle concealed in a black backpack, mistakenly believed that the deputy sheriff was a participant in the military exercise and that the traffic stop conducted by the deputy sheriff was staged in order to test their ability to evade capture. Tragically, the deputy sheriff, petitioner Randall Butler, was completely unaware of the military exercise or of the Special Forces soldiers' true identities, which they never disclosed to him. Perceiving, correctly, that the soldiers were armed with at least one firearm, and believing that

the soldiers presented a deadly threat to him, Deputy Butler opened fire with his service pistol, killing Tomeny and wounding Phelps.

On February 23, 2002, petitioner Butler confronted circumstances that caused him to reasonably believe that Tomeny and Phelps posed an imminent, deadly threat. However, in denying qualified immunity to Butler, the Fourth Circuit, without explanation, chose to view these tense, uncertain and rapidly evolving circumstances not only in hindsight, but also solely from the perspective of the criminal suspects, rather than Butler's. In so doing, the Fourth Circuit opinion incorrectly applied the qualified immunity analysis, focusing on the perspective of the plaintiffs instead of focusing on an analysis of the objective reasonableness of an officer's actions when viewed from the perspective of a reasonable officer on the scene. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).

By declining to rehear this case, *en banc* or otherwise, the Fourth Circuit has failed to afford Deputy Butler with the immunity to which law enforcement officers are entitled when they are forced to make reasonable split-second decisions regarding whether to use deadly force in the context of rapidly evolving circumstances, where inaction could threaten their safety or that of others.

The Fourth Circuit's opinion, which requires a law enforcement officer to wait for an aggressive suspect (whom the officer reasonably believes is armed with a firearm) to actually draw first before taking action to defend himself, is indefensible as a matter of law and

policy. The Fourth Circuit's opinion not only conflicts with binding Supreme Court precedent and its own prior holdings regarding the use of force in the face of a reasonable belief that a suspect is armed with a deadly weapon, but also the holdings of other circuit courts that officers are not required to gamble with their lives in the face of a serious threat of harm. The Fourth Circuit's opinion virtually guarantees that officers who are forced to use deadly force to protect themselves will be second-guessed in civil rights lawsuits.

1. Incident Giving Rise to the Case

On February 23, 2002, First Lieutenant Tallas Tomeny and Staff Sergeant Stephen Phelps were U.S. Army Special Forces soldiers engaged in a training exercise or "war game" known by the Army as "Operation Robin Sage." Tomeny and Phelps were disguised as civilians, playing the roles of insurgents who had invaded a fictional enemy country called "Pineland" with the express intention of joining with "friendly" civilian volunteers (who were also role playing) to overthrow the fictional "repressive" government. The soldiers and civilians were expected to remain in their roles throughout the exercise, and the soldiers had been directed to accomplish their mission, avoid capture, and retain possession of their weapons. Soldiers involved in this "training exercise" were also instructed to consider any law enforcement officer that they encountered to be part of the "repressive" government and thus an "enemy."

The United States Army did not notify local law enforcement, including the Moore County Sheriff's

Office, that this military exercise was ongoing. Likewise, the Army did not advise the Moore County Sheriff's Office that soldiers would be moving about Moore County disguised in civilian clothes and carrying concealed firearms.

On the day in question, Tomeny and Phelps – playing the roles of enemy insurgents in the fictional country – had joined with Charles Leiber, a "civilian auxiliary" in the war game who was role-playing his part as a civilian sympathetic to the cause of, and giving aid to, the enemy insurgents. On that day, Leiber and the two soldiers – role-playing as enemy insurgents – were driving around Moore County in Leiber's unmarked, civilian pick-up truck, attempting to do "reconnaissance on a railroad bridge." The weather was overcast and cold, with the temperature hovering around 40 degrees.

At this time, Deputy Butler was working as a road deputy in his assigned area of northern Moore County, in the rural area surrounding the Town of Robbins. As of February 23, 2002, there had been an ongoing series of property crimes in the area, including burglaries of houses and outbuildings. That morning, while driving on routine patrol in his marked patrol car, Butler noticed Leiber's unfamiliar green pick-up truck, which had distinctive wooden sideboards, parked on the side of the road. Butler also noticed that someone was sitting in the back of the truck.

About an hour and a half later, at approximately 1:45 p.m., Butler was sitting in his parked patrol car several miles elsewhere in northern Moore County, monitoring traffic at the intersection of N.C. Highway 705 and

Howard Mill Road. He observed the same distinctive green pickup truck approaching from his right on Highway 705. As the truck approached him, Butler made eye contact with the passenger in the truck's cab. The passenger immediately ducked down below the dashboard, apparently trying to hide himself, and pushed a large object in his lap down out of sight as he was ducking. Butler also observed a man riding in the bed of the truck, appearing to be asleep, which seemed unusual to him, especially given the cold weather that day.

After Butler made eye contact with the passenger, the truck made an immediate right turn directly away from Butler onto Howard Mill Road. Butler pulled out to follow the truck. After Butler had followed the truck for a short distance, the truck made another evasive maneuver, turning abruptly onto Acorn Ridge Road, which loops less than a half mile directly back onto Highway 705 almost to the very point where Butler had seen the truck moments before. Based on reasonable suspicion of criminal activity, Butler activated his blue lights and initiated a lawful investigative traffic stop.[1]

Tragically, the U.S. Army cadre instructors supervising Phelps and Tomeny had instructed them and their fellow soldiers to consider any law enforcement officer that they might encounter during the exercise to be an "enemy." In response, the members of Phelps' and

1. While the Fourth Circuit opinion omits any discussion of the reasons for Butler's traffic stop, the District Court found that Butler's suspicion that Phelps, Tomeny, and Leiber might be engaged in criminal activity was more than justified by their behavior and that his traffic stop was lawful. The respondents did not dispute this ruling.

Tomeny's small unit formulated a standard operating procedure, or SOP, for how to deal with law enforcement officers they might encounter. The SOP encompassed trying to talk their way out of trouble. Alternatively, they might attempt to bribe the officer using fake money issued as part of the exercise. Should these efforts fail, another option was to "kill" the officer by shooting him with their M-4 assault rifles or M-9 pistols using blank ammunition.

In any event, Phelps, Tomeny, and Leiber believed that Deputy Butler was part of the training exercise, and they behaved accordingly. In fact, Phelps testified that he believed that the traffic stop was a scripted or staged part of the military exercise and that he continued to hold this belief right up until the moment that he was shot.

Leiber pulled his truck into the parking lot of Acorn Ridge Baptist Church, and stopped. The parking lot was empty, and there was little or no traffic on the road. Butler pulled into the parking lot, and parked his car directly behind Leiber's truck, approximately 8-10 feet back. Butler exited his patrol car and approached the truck. There were three men in the truck: the driver, Charles Leiber; the passenger in the cab, Tallas Tomeny; and the man laying in the bed of the truck, Stephen Phelps. All three men were Caucasian, unkempt and unshaven, and were dressed in outdoor type civilian work clothes.

Butler walked to the driver's side of the truck, and spoke with the truck's driver, Leiber, who appeared to be in his 60's. Butler looked into the cab of the truck,

and saw that the passenger in the cab, Tomeny, had his legs in an awkward position, as if he were trying to conceal something with his legs. Butler asked Leiber to accompany him back to his patrol car. Leiber complied, and walked back to Butler's patrol car. Leiber sat down in the passenger's seat, while Butler sat in the driver's seat.

Butler spoke with Leiber and attempted to determine who Leiber and his passengers were and what they were doing. Leiber handed Butler his driver's license, which indicated that he lived in Seagrove, North Carolina, a town in neighboring Randolph County several miles north of Robbins. However, Leiber told Butler that he lived in "Pineland," a place Butler had never heard of and which does not exist. Leiber said that he did not live in the local area, and that he and his passengers were going fishing. Butler saw what appeared to him to be two toy fishing rods in the back of the truck, which further aroused Butler's suspicion. Leiber would not answer Butler's questions regarding where he and his passengers were going fishing, but simply stammered, "Going fishing. Going fishing." Leiber then said that his passengers were "migrant workers." Butler tried to get clarification from Leiber, asking, "Well, which is it? You going fishing or you have migrant workers?" Leiber responded that he was trying to find some work for some "migrant workers" who were "Mexicans." This response aroused further suspicion on the part of Butler because it was winter time. Butler knew there were no crops in season and therefore no work for migrant workers in that area. Leiber then told Butler "I am on a recon," which made no sense to Butler. It was Butler's perception that Leiber's responses were deceptive, and "were just not adding up."

Unable to obtain a coherent explanation or truthful responses from Leiber, Butler exited his car (leaving Leiber seated, unsecured, inside) and approached the passenger seated in the cab (Tomeny) in order to question him regarding their identities and activities. Butler observed that the passenger seated against the cab in the truck bed still had his eyes closed, indicating he was asleep or pretending to sleep. This further aroused Butler's suspicion, since there had been more than enough noise and activity to wake any normal person. As Butler approached, Tomeny rolled the window down. Tomeny told Butler that they were migrant workers "going fishing on their day off." As noted earlier, Butler knew that there were no crops in season at that time, and, therefore, no work for migrant workers in that area. Moreover, although most migrant workers in Moore County are Hispanic, and Leiber had referred to trying to find work for "Mexicans," Butler did not perceive Tomeny – who was in fact a Caucasian — to be Mexican or Hispanic.

As Butler spoke with Tomeny, Butler noticed that there was a bag on the floor of the cab under Tomeny's legs. Tomeny appeared to be "real uncomfortable," and appeared to be attempting to conceal the bag from Butler's view. The bag on the floorboard of the truck cab was in fact a black bag, or "backpack," which had multiple compartments and zippers. The bag contained various items, including the two halves of a disassembled M-4 assault rifle in the main compartment of the bag. At that time, Butler did not know that the bag contained a firearm.

After seeing the bag on the floorboard, and noting that Tomeny seemed anxious to conceal it, Butler asked Tomeny to step out of the vehicle and to show him the contents of his bag. Tomeny, who was nervous and stuttering, reluctantly agreed to allow Butler to examine the contents of his bag.

Butler and Tomeny walked to the rear of the truck, where the bag was placed on the opened tailgate. Phelps continued to pretend to be sleeping, which seemed highly suspicious to Butler. Although Tomeny had agreed to show Butler the contents of the bag, Tomeny deliberately attempted to keep Butler from seeing everything that was in the bag. Tomeny, who was holding the bag, did allow Butler to see into some of the bag's multiple compartments; however, he also behaved in a highly suspicious fashion by blatantly attempting to keep Butler from seeing all of the items in the bag; by acting as though he did not know how to find or "operate" some of the simple zippers on the bag; by turning the bag over several times; by moving very slowly; and by halfway unzipping some of the zippers on the bag, and then quickly zipping them closed, all in an apparent attempt to keep Butler from seeing inside. Both Leiber and Phelps testified that Tomeny was "stalling," and that he was clearly trying to keep Butler from seeing all of the items that were in the bag. Phelps, who was in the bed of the truck seated against the cab with his head down and eyes closed pretending to be asleep, testified that Tomeny never opened the compartment of the bag that

contained the disassembled assault rifle, and opined that Butler could not have seen the weapon inside.[2]

The next sequence of events, described below, occurred over the period of just a few seconds.

After perceiving what he believed were firearms in the bag, Butler grabbed for the bag in order to get it away from Tomeny. Tomeny responded aggressively, vigorously trying to pull the bag away from Butler, determined to keep control of the bag and its contents. Tomeny and Butler physically struggled over the bag, each determined to wrest the bag from the other. Butler was ultimately able to tear the bag from Tomeny's determined grip. The bag was "heavy," which was consistent with Butler's belief that the bag contained firearms. After tearing the bag away from Tomeny, Butler threw the bag behind him toward the left front tire of his patrol car in order to get what he believed to be firearms away from Tomeny and Phelps. The bag came to rest about 8 feet behind Butler. As he turned back after throwing the bag, Butler felt and saw Tomeny's hands at Butler's right hip, near Butler's pistol. In response, Butler pushed Tomeny away from him and drew his pistol, pointing it at Tomeny and commanding him to stay back.

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2. Butler testified that at some point during the interaction with Tomeny at the tailgate of the truck, he glimpsed what he perceived to be two "machine guns" inside of the bag. However, taking the facts in the light most favorable to the plaintiffs, the District Court and the Fourth Circuit held that based upon Phelps' testimony, Butler could not have *seen* the M-4 assault rifle.

Having created some distance between himself and Tomeny, Butler reholstered his pistol. Tomeny again moved toward Butler. Butler pushed Tomeny away again, grabbed his canister of pepper spray and sprayed a stream toward Tomeny's face, attempting to incapacitate him. Tomeny turned his head, and it was Butler's perception that the pepper spray did not hit Tomeny. Tomeny remained on his feet and immediately began "yelling" and "screaming."

At that very instant, Phelps, who up to that point had been pretending to be asleep, suddenly leapt to his feet, quickly jumped off of the back of the truck, and rushed straight toward the bag that Butler believed contained firearms. At this point, Butler's perception and belief was that he was in a perilous, life-or-death situation. Butler believed that Phelps was "going for" the firearms in the bag. Indeed, Phelps testified that his chief intention was to secure possession of the assault rifle in the bag. In the midst of this chaotic scene, Butler thought that he heard Tomeny yell for Phelps to "kill him now."[3]

Butler's memory is that he shot Phelps first and then Tomeny, whereas the recollection of Phelps and Leiber is that Tomeny was shot first, then Phelps. In any event,

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3. Although he acknowledged that Tomeny was yelling and screaming at this time and that he could not hear or remember everything that Tomeny said, Phelps testified that he never heard Tomeny yell the words "kill him now." Accordingly, taking the facts in the light most favorable to the plaintiffs, the District Court and the Court of Appeals determined that Tomeny never said these words and thus Butler could not have heard them or believed that he did.

the interval between the shooting of Tomeny and Phelps was "a split-second," regardless of the order of the shooting. The sequence of events (with Tomeny being shot first, then Phelps) is set forth below, focusing on the information known to and the reasonable perceptions of Butler.

When Phelps jumped off the back of the truck and headed straight for the bag, Butler suddenly found himself outnumbered and completely surrounded by three men whom he reasonably perceived to be noncompliant, aggressive, and hostile. At the point when Phelps reached the bag, Butler, who was facing in the direction of the truck, was almost directly between Tomeny and Phelps, with Tomeny to his right (about 15 feet away) and Phelps to his left (about 8-10 feet away). In addition, Butler was aware that Leiber was behind him, unsearched and unsecured in an unlocked patrol car. Thus, Butler was completely surrounded by the three men, and hemmed in by the two vehicles.

As Phelps quickly moved to the bag, Butler's attention was divided. Butler tried to watch both Phelps and Tomeny simultaneously, a difficult if not impossible task, given that Butler was almost directly between the two men. Butler watched Phelps as he sprinted toward the bag, while attempting to use his "peripheral vision" to watch Tomeny. During these few critical moments, Tomeny was standing up, was twisting, and continuing to yell. Moreover, Tomeny had his body "angled" or turned so that his left side was turned toward Butler. As Butler watched Phelps move toward the bag, Butler's perception – through his "peripheral vision" – was that Tomeny, whose left side was turned toward Butler, was

reaching behind his back with his right arm in a way that was consistent with reaching for a firearm. Based on what he believed he was seeing in his "peripheral vision," Butler believed that Tomeny posed a deadly threat to him. Thus, Butler turned and shot Tomeny, fatally wounding him.

Meanwhile, Phelps – after leaping to his feet and jumping off of the truck bed – ran straight to the bag and grabbed it. According to Phelps' testimony, after Phelps grabbed the bag containing the assault rifle, he began moving away from Butler. Phelps testified that he heard a shot or shots, which caused him to stop and abruptly turn to face Butler. At virtually the same instant that Phelps stopped and turned to face Butler, he dropped to the ground on all fours or on his knees, still holding the bag containing the firearm. Thus, when Butler turned back toward Phelps a split-second after shooting Tomeny, Phelps was on the ground facing him, on all fours or on his knees, and in control of the bag that Butler reasonably perceived contained a firearm or firearms. Believing that Phelps was armed and was going to shoot him, Butler shot Phelps. The shooting occurred a split-second after the shooting of Tomeny, and mere moments after Phelps jumped off of the truck.

Butler retreated to the rear of his patrol car where he could cover Mr. Leiber, who was still seated in the patrol car and whose intentions were unknown. Butler called for backup and an ambulance.

2. District Court Proceedings

Respondents brought suit against Deputy Butler in both his official and individual capacities, Lane Carter, the Sheriff of Moore County, in his official capacity, and Fidelity and Deposition Company of Maryland, the surety on Sheriff Carter's official bond. In their Amended Complaint, the Respondents asserted the following claims against Butler in his individual capacity: (1) a claim under 42 U.S.C. § 1983 that Butler used excessive force; (2) a claim under 42 U.S.C. § 1983 for stopping the vehicle in which Phelps and Tomeny were passengers; (3) a state law tort claim for assault and battery; and (4) a state claim, "[i]n the alternative," that Butler negligently shot Phelps and Tomeny.

The Respondents asserted the following claims against Sheriff Carter: (1) a claim under 42 U.S.C. § 1983 alleging that the Sheriff's Office is liable for the alleged constitutional violations committed by Butler; (2) a claim under 42 U.S.C. § 1983 that the Moore County Sheriff's Office failed to adequately train its officers; (3) state claims, under the doctrine of respondeat superior, for assault and battery and/or negligence; and (4) a direct negligence claim against Sheriff Carter.

The Plaintiffs further asserted a state law statutory claim against Respondent Fidelity and Deposit Company of Maryland on the sheriff's bond pursuant to N.C. Gen. Stat. § 58-76-5.

The Petitioners moved for summary judgment as to each and every claim asserted by the Respondents. On July 12, 2006, the District Court issued its Memorandum

Opinion and Order. In its ruling, the District Court for the Middle District of North Carolina granted Butler's motion for summary judgment as to the Respondents' claim under Section 1983 based on Butler's stopping the Respondents' vehicle, granted Petitioners Sheriff Carter and Fidelitys' motion for summary judgment as to the Respondents' claims against these defendants under Section 1983, and also granted summary judgment as to the Respondents' direct negligence claim against Sheriff Carter. However, the District Court denied Butler's motion for summary judgment as to the Respondents' claims for "excessive force" under federal and state law, rejecting Butler's claim of entitlement to qualified immunity and public officer's immunity. Further, the District Court denied the motion for summary judgment of Petitioners Carter and Fidelity as to the Respondents' state tort claims for assault and battery and negligence under a theory of respondeat superior based upon Butler's alleged "excessive force," The Petitioners timely filed notice of appeal.

3. Decision of the Fourth Circuit Court of Appeals

In a brief, unpublished, per curiam panel opinion issued on November 15, 2007, the Fourth Circuit affirmed the District Court's denial of summary judgment on the issue of excessive force, determining that "Butler's actions were (1) neither reasonable because he had insufficient justification for his use of deadly force; or (2) nor protected by qualified immunity because, at the time of the shootings, it was clearly established that the use of deadly force was not justified under these facts." *Massasoit v. Carter*, No. 06-1929, 2007 WL 3390462, * 5-6 (4th Cir. Nov. 15, 2007).

The Respondents timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 29, 2007, which was denied on December 10, 2007.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Panel Opinion Is In Conflict With Applicable Supreme Court Authority And Decisions Of Other Circuit Courts.

The Fourth Circuit's denial of qualified immunity in this case is in conflict with the holdings of this Court, and contradicts every other court that has considered the same Fourth Amendment issue, including the Fourth Circuit itself, and thus creates a split among the circuits regarding the perspective through which the qualified immunity analysis should be analyzed.

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 735 (2002) (*citing Saucier v. Katz*, 533 U.S. 194 (2001)). "If a constitutional right would have been violated under the plaintiffs version of the facts, 'the next, sequential step is to ask whether the right was clearly established.' " *Saucier*, 533 U.S. at 201. In other words, "the salient question" is whether the state of the law at the time of this incident gave the defendant "fair and clear warning" that his conduct with respect to plaintiff was unconstitutional. *Hope*, 536 U.S. at 746 (*citing United States v. Lanier*, 520 U.S. 259 (1997)).

Under the threshold inquiry, the Fourth Circuit's decision in this case conflicts with well established Supreme Court precedent that requires courts to judge

an officer's use of force from the perspective of the officer on the scene. It is not constitutionally unreasonable for an officer to use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or "if the suspect threatens the officer with a weapon . . . and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S.Ct. 1694, 1701 (1985). Further, claims that law enforcement officers used "excessive force" are analyzed under the Fourth Amendment and its "objective reasonableness standard." In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), this Court cautioned courts to view police force from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396-9. In *Graham v. Connor*, this Court articulated this standard as follows:

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . , its proper application requires careful attention to the facts and circumstances of each particular case. . . . The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

> . . . [T]he "reasonableness" inquiry in an excessive force is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham v. Connor, 490 U.S. 386, 396-397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)(citations and quotation marks omitted).

In this case, the Fourth Circuit panel violated the holding in *Graham* by absolutely failing to consider the reasonable perceptions of Butler, instead viewing the facts only from the perspective of the plaintiff Phelps and what he could purportedly see and hear.[4] The Fourth Circuit also viewed the facts with the benefit of 20/20 hindsight by focusing piecemeal on Phelps' and Tomeny's actions, completely disregarding the fact that defendant Butler had to react, in a matter of moments, to Phelps' and Tomeny's aggressive and non-compliant actions as they were occurring virtually simultaneously. From Butler's reasonable perspective, he was surrounded and outnumbered by three dangerous, aggressive, and hostile men; men who were neither physically subdued nor compliantly yielding to him; men whom he reasonably believed had firearms; men whom he perceived posed a deadly threat.

Under *Graham*, the proper question should be whether the information known by Butler at the time allowed him to reasonably believe that Phelps and Tomeny posed a risk

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4. For much of the incident in question, which lasted only a few seconds, Phelps was pretending to be asleep, with his head down and eyes closed.

of death or serious bodily harm. In the instant case, in light of the information known to Butler, and Butler's reasonable perceptions, it is clear that the force used by Butler was objectively reasonable.

First, it is significant that the events at issue in this lawsuit took place during a traffic stop. The Supreme Court, noting that "a significant percentage of murders of police officers occurs when the officers are making traffic stops," has "specifically recognized the inordinate risk" to an officer making a traffic stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). *See also Maryland v. Wilson*, 519 U.S. 408, 413, 117 S.Ct. 882, 885, 137 L.Ed.2d 41 (1997) (citing statistics showing the great risk of death or assault to an officer making a traffic stop). As the Tenth Circuit stated in *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001) (en banc):

> The terrifying truth is that officers face a very real risk of being assaulted with a dangerous weapon each time they stop a vehicle. . . . An officer in today's reality has an objective, reasonable basis to fear for his . . . life every time a motorist is stopped. . . .

264 F.3d at 1223 (emphasis added). Furthermore, where, as here, there are multiple occupants of the vehicle, the "inordinate" danger to the officer increases. *Maryland v. Wilson*, *supra*. These "terrifying truth[s]" must be considered in assessing the reasonableness of Butler's actions.

Moreover, in light of the information known to Butler, as well as his reasonable perceptions, the force used by

Butler was reasonable. At the point in time where the "tense, uncertain, and rapidly evolving" circumstances forced Butler to make a split-second judgment about the amount of force to use, Butler had the following information and reasonable perceptions: After Butler stopped the truck, he was confronted by three men, all of whom were behaving suspiciously. The driver, Leiber, gave conflicting and obviously false answers to Butler's simple inquiries. The passenger in the truck bed, Phelps, suspiciously pretended to be sleeping throughout most of the encounter. The passenger in the cab, Tomeny, lied to Butler by telling him that they were migrant workers who were going fishing on their day off, an obvious lie that Butler knew to be false. Tomeny attempted to conceal a bag that was lying in the floorboard of the truck. Tomeny then deliberately, and obviously, attempted to keep Butler from seeing all the contents of the bag. Butler glimpsed what be believed to be firearms in one of the compartments of the bag. In fact, the bag contained an assault rifle.

Butler then attempted to grab the bag away from Tomeny, and Tomeny, instead of peacefully surrendering the bag, aggressively struggled with Butler. After attempting to spray Tomeny with pepper spray, and perceiving that the pepper spray missed Tomeny's face, Butler heard Tomeny begin to yell and scream, and Butler believed that he heard Tomeny yell something like, "kill him now." At that very instant, Phelps – who had been pretending to sleep – suddenly leapt to his feet, quickly jumped off of the back of the truck, and rushed straight to the bag that Butler believed contained firearms. At this point, Butler reasonably perceived that he was surrounded by aggressive and hostile men who

were possibly or probably armed and dangerous. In this uncertain, tense, and rapidly evolving scenario, Butler attempted to watch both Phelps and Tomeny, using his peripheral vision. Phelps quickly raced to the bag, grabbed it, moved a few feet, then quickly turned to face Butler. At the instant that Phelps turned to fact Butler, he dropped to the ground, still holding the bag containing the firearm. Believing that Phelps was armed, and was going to shoot him, Butler shot Phelps. At the instant he shot Phelps, Butler's perception – through his peripheral vision – was that Tomeny, who was twisting and turning, and was standing sideways to Butler, was reaching with his right arm in a way that, from Butler's perspective, seemed consistent with reaching for a firearm. Based on what Butler believed he was seeing in his "peripheral vision," Butler believed that Tomeny posed a deadly threat to him. Thus, a split-second after shooting Phelps, Butler shot Tomeny.

From the vantage of an officer facing potentially dangerous individuals, individuals who are "neither physically subdued nor compliantly yielding remain[ ] capable of generating surprise, aggression, and death." *Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994). Moreover, as the Supreme Court stated in *Graham*, "the calculus of reasonableness must embody the allowance of the fact" that Butler was forced to make a split-second judgment under incredibly tense and uncertain circumstances. From Butler's perspective, if he had hesitated for even an instant before shooting, it could have resulted in his death. The Constitution does not require law enforcement officers to gamble with their lives when faced with such a life-threatening scenario, nor does the Fourth Amendment require police officers

to wait until a suspect shoots to confirm that a serious threat of harm exists.

As noted above, under the Fourth Amendment "objective reasonableness" test, a law enforcement officer "may employ deadly force where the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . ." Such probable cause may exist even in the situation where the officer's belief is not more likely true than false. *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983). In assessing the reasonableness of the officer's actions, the Court's focus must be exclusively on what the officer knew and reasonably perceived immediately prior to and at the moment he fired the shots, and not on the basis of 20/20 hindsight. Moreover, the Fourth Amendment test requires deference to the judgment of the officer on the scene. *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158. Given the facts, and Butler's reasonable perceptions, as outlined above, it is clear that Butler had probable cause to believe that Phelps and Tomeny posed a deadly threat.

It is true that when the facts and testimony are viewed with the benefit of 20/20 hindsight, it turns out that Butler was mistaken about the actual threat posed by Phelps and Tomeny. Phelps and Tomeny were not actually dangerous criminals; instead, they behaved like dangerous criminals because they were playing the roles of enemy insurgents. However, as this Court has made crystal clear,

> [t]he crucial question is not what hindsight may uncover ... Because police officers are regularly forced to make critical decisions

> under extreme time pressure – decisions which may seem much easier after facts have unfolded and time for reflection has been afforded – reasonable judgments which turn out to be mistaken are nonetheless entitled to protection.

Taylor v. Farmer, 13 F.3d 117, 120 (4th Cir. 1993). Thus, it is well established that an officer's use of deadly force is reasonable in the situation where a reasonable officer, facing the same circumstances, could have believed or suspected that the suspect was armed, and/or a threat to use deadly force, even if the officer's belief turns out to be mistaken. Similarly, in the instant case, Butler's use of force was justified because the objective facts and his reasonable perceptions gave Butler probable cause to believe that Phelps and Tomeny posed a threat of serious physical harm, even though Butler's reasonable interpretation of the actual facts turned out to be mistaken.

There are numerous other cases, many authored the Fourth Circuit itself, showing that where, as here, the officer has probable cause to believe that the suspect poses a threat of serious physical harm to the officer, the officer is justified in using deadly force – even if it later turns out that the suspect was in fact unarmed or did not in reality pose any threat.

For example, in *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir.), *cert. den.*, 513 U.S. 1018, 115 S.Ct. 581, 130 L.Ed.2d 496 (1994), an officer shot an unarmed, handcuffed arrestee outside of a magistrate's office. The officer, having heard that someone in the area had a gun,

and suspecting that it might possibly be McLenagan, shot the unarmed, handcuffed McLenagan. Even though the actual facts were that McLenagan was unarmed, the Court held that the officer's use of deadly force was reasonable.

As held by the Fourth Circuit in *McLenagan*:

> [W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him . . . It is true that [the officer] did not see a gun in McLenagan's hands, but it is also true that he could not confirm that McLenagan was unarmed. We will not second-guess the split-second judgment of a trained police officer merely because the judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer . . . Although it is extremely unfortunate that McLenagan was seriously injured, § 1983 does not purport to redress injuries resulting from reasonable mistakes . . .

27 F.3d at 1008-1009. The Fourth Circuit also noted that part of its analysis was based on the fact that the officer in McLenagan "had no time to consider anything at all – except his and the public's immediate safety." 27 F.3d at 1008.

Similarly, in *Milstead v. Kibler*, 243, F.3d 157, 164-5 (4th Cir. 2001), an officer shot an unarmed person emerging from a residence. In the split-second that the officer had to decide whether or not to shoot, the officer

perceived or suspected that the person was a dangerous, possibly armed intruder; however, in fact, the person emerging from the residence was an innocent, unarmed victim. The Court held that even though the person was unarmed, and posed no danger to the officer or the public, the officer reasonably perceived that the person was armed and dangerous.

In *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991), the officer shot a passenger in a vehicle who was reaching behind the seat for an object that the officer perceived or suspected was a shotgun. In fact, there was no firearm in the vehicle: the passenger was reaching for a wooden nightstick. Even though the passenger was not actually reaching for a firearm, this Court held that the officer's use of deadly force was reasonable under the circumstances.

In *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), the officer was attempting to take custody of Mr. Slattery, a passenger in a car. The officer could not see Slattery's left hand clearly, but was able to see that Slattery's left hand appeared to be "partially closed around an object." In fact, Slattery was holding a bottle of beer. In response to the officer's order to raise his hands, Slattery turned his upper body toward the officer. The officer, perceiving or suspecting that Slattery was "coming at him with a weapon," shot Slattery. The trial court denied the officer's motion for summary judgment, and the Fourth Circuit reversed. The Fourth Circuit held that even though Slattery was unarmed, and was holding a bottle of beer instead of a firearm, it was reasonable for the officer to perceive or suspect that Slattery was, or could have been, armed and dangerous. Thus, the Fourth

Circuit held that the officer was entitled to qualified immunity.

In *Anderson v. Russell*, 247 F.3d 125, 129 (4th Cir. 2001), the officer shot an unarmed citizen as the citizen lowered his hands in order to reach into his back left pocket to turn off his radio. Even though the actual facts were that the citizen was not armed, this Court upheld the trial court's Rule 50 judgment in favor of the officer, holding that the officer's "split-second decision to use deadly force . . . was reasonable in light of [the officer's] well-founded, though mistaken belief that [the citizen] was reaching for a handgun."

In the cases cited above, each officer had a *mistaken* understanding, perception, or belief regarding the existence of a firearm. In the cases cited above, each officer mistakenly believed or perceived that a firearm was present; nevertheless, in each of these cases, the Fourth Circuit, the same held that the officer's mistaken perception or belief was reasonable. In the instant case, Butler's perception and belief, that there was a gun or guns in the bag, was correct, not mistaken. Nevertheless, in contradiction of the rulings of this Court, not to mention its own extensive precedent, the Fourth Circuit has erroneously determined that Butler's actions were objectively unreasonable such that he is not entitled to qualified immunity.

In short, Butler's use of deadly force, in the circumstances of this case, was reasonable. Given the "terrifying truth" that "[a]n officer in today's reality has an objective, reasonable basis to fear for his . . . life" when he engages in a traffic stop, *United States v. Holt*,

supra, and given the information known to Butler as well as Butler's reasonable perceptions, it is crystal clear that Butler had probable cause to believe that Phelps and Tomeny posed a threat of serious physical harm to him. Thus, Butler's use of deadly force was reasonable.

In all these decisions, the court was rightfully concerned with providing the officer on the street with the discretion to make split-second decisions instead of second-guessing the decision with the benefit of 20/20 vision of hindsight. As succinctly stated by the Sixth Circuit in *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992):

> We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

II. This Case Has Significant Public Policy Implications for Law Enforcement in this Country.

The facts of this case demonstrate the purpose of the doctrine of qualified immunity. Deputy Butler was placed in a situation in which he reasonably perceived that he was in a life or death struggle. Alone and with backup far away, Butler was outnumbered by three men, Tomeny, Phelps and Leiber, who knew they were play-acting in a military exercise. Tomeny, Phelps and Leiber believed that Butler was part of the military exercise and that he was their "enemy," someone against whom

were to resist capture or apprehension and someone whom they were to dupe, bribe, or "kill" within the rules of the make-believe exercise. Butler, on the other hand, believed that everything that was going on – including the bizarre behavior, the noncompliant behavior, and the hostile, aggressive behavior – was all real. Tomeny, Phelps and Leiber did not act at all like law abiding citizens. To the contrary, their actions were consistent with the actions of desperate, dangerous men who were willing to risk everything – even their very lives – rather than submit to Butler. Thus, from Butler's perspective, at the time that he used deadly force, he was surrounded and outnumbered by three dangerous, aggressive, and hostile men; men who were neither physically subdued nor compliantly yielding to him; men whom he reasonably believed had firearms; men whom he reasonably believed posed a deadly threat. Butler was forced to make the extremely difficult decision to use deadly force and potentially take a human life, or lose the last opportunity to save his own. The situation was not of his own making, and he had to make a choice without the "luxury of a second chance." *See Whitley v. Albers*, 475 U.S. 312, 320 (1986).

The Fourth Circuit's decision does exactly what numerous cases have cautioned against:

> In making an excessive force inquiry, we are not to view the matter as judges from the comfort and safety of our chambers, fearful of nothing more threatening than the occasional paper cut as we read a cold record accounting of what turned out to be the facts. We must see the situation through the eyes of the officer

> on the scene who is hampered by incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal.

Crosby v. Monroe County, 394 F.3d 1328, 1333-1334 (11th Cir. 2004).

The Fourth Circuit's decision in this case requires police officers to wait until a suspect shoots to confirm that a serious threat of deadly harm exists before taking action to defend themselves. Qualified immunity should provide an "accommodation for reasonable error," and " 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Respectfully, the Fourth Circuit's opinion, reached in the "peace of a judge's chambers" rather than in the tense and rapidly evolving circumstances of a dangerous and threatening traffic stop, should not be allowed to stand. *See Graham*, 490 U.S. at 396, 109 S.Ct. at 1872.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES R. MORGAN, JR.
WOMBLE CARLYLE
SANDRIDGE & RICE
A Professional Limited Liability Company
One West Fourth Street
Winston-Salem, NC 27101
(336) 721-3710

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED NOVEMBER 15, 2007

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1929

CODY HASTINGS MASSASOIT, Executor for Tallas Hastings Tomeny, Deceased; STEPHEN PHELPS,

Plaintiffs - Appellees,

versus

LANE CARTER, Sheriff, In his official capacity; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; RANDALL BUTLER, Deputy, In his individual and official capacity,

Defendants - Appellants,

and

MOORE COUNTY SHERIFF DEPARTMENT,

Defendant.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Russell A. Eliason, Magistrate Judge. (1:04-cv-00151)

Appendix A

Argued: September 27, 2007
Decided: November 15, 2007

Before SHEDD, Circuit Judge, HAMILTON, Senior Circuit Judge, and SAMUEL G. WILSON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

During a traffic stop, Moore County (N.C.) Deputy Sheriff Randall Butler shot and killed Tallas Tomeny and shot and seriously wounded Stephen Phelps. Phelps and Tomeny's estate (collectively, "appellees") filed an action under 42 U.S.C. § 1983 and North Carolina state law against Butler, Lane Carter, and Fidelity and Deposit Company of Maryland ("Fidelity") (collectively, "appellants").* The appellants moved for summary judgment, arguing that Butler's actions were (1) reasonable or, alternatively, (2) protected by qualified immunity. The district court denied the motion, and the appellants now appeal. Finding no error, we affirm.

I

In their complaint, the appell[ees] claim that (1) Butler violated their right to be free from the use of

* Carter is the sheriff of Moore County and Fidelity is the surety on Carter's bond, which North Carolina law requires that sheriffs purchase. N.C. Gen.Stat. § 162-8.

excessive force and (2) Carter and Fidelity have derivative liability for Butler's actions. The appell[ants] moved for summary judgment, arguing that (1) Butler's use of force was reasonable because he had probable cause to believe that the appell[ees] posed a serious threat to Butler's safety or the safety of others, or alternatively, (2) if Butler's use of force was unreasonable, he is nonetheless entitled to qualified immunity because the right violated was not "clearly established." *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *see Tennessee v. Garner,* 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The district court denied the appellants' motion because the appellees' version of the facts would not entitle the appellants to summary judgment on either the question of reasonableness or qualified immunity.

We review *de novo* the district court's denial of a motion for summary judgment. *Johnson v. Caudill,* 475 F.3d 645, 650 (4th Cir.2007). On a motion for summary judgment, we view the facts in the light most favorable to the non-moving party. *See Scott v. Harris,* __ U.S. __ __, __, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007). Under this standard, the record indicates the following facts.

As part of their training for the Green Beret Special Forces, Tomeny and Phelps participated in an exercise termed "Operation Robin Sage." Operation Robin Sage has been conducted for over forty years in and around Moore County. During the exercise, soldiers join with civilian volunteers to overthrow the government of the

fictional country of "Pineland." The soldiers must accomplish their mission, avoid capture, and maintain their roles throughout the exercise.

On February 23, 2002, civilian volunteer Charles Leiber drove a Ford Ranger pick-up truck with Tomeny in the passenger seat and Phelps in the truck bed. Tomeny possessed a bag, which contained an M-4 assault rifle. While on patrol, Butler pulled over the pick-up truck because he felt the occupants' behavior indicated that they might be searching for robbery targets. Butler led Leiber to his patrol car for questioning. After leaving Leiber in the patrol car, Butler led Tomeny from the pick-up truck passenger seat to the truck bed so that he could search Tomeny's bag. Butler never saw the gun in the bag because the compartment containing the gun remained closed. During the search, Tomeny and Butler tussled for the bag. Butler pushed Tomeny away and threw the bag to one side. Tomeny raised his hands and did not bump Butler or reach for Butler's service weapon. Butler drew his service weapon with the safety off. Then, Butler reholstered his service weapon and sprayed Tomeny in the eyes with pepper spray until the pepper spray appeared to run out. Tomeny yelled and screamed when sprayed, but did not threaten Butler with physical force. As Tomeny rubbed his eyes from the pepper spray with both hands at his head, Butler pulled his service weapon and shot Tomeny twice. While Butler pepper sprayed Tomeny, Phelps fled the pick-up truck bed, grabbed the bag, and ran toward the woods. As he was running, Phelps heard the shots fired at Tomeny and turned suddenly. Because of the wet pavement,

Phelps slipped and fell to his hands and knees. Phelps did not attempt to open the bag. Without warning Phelps, Butler shot him twice.

Under these facts, which we reiterate are in the light most favorable to Tomeny and Phelps, Butler's actions were (1) neither reasonable because he had insufficient justification for his use of deadly force, (2) nor protected by qualified immunity because, at the time of the shootings, it was clearly established that the use of deadly force was not justified under these facts. Accordingly, we affirm the decision of the district court. *Massasoit v. Carter*, 439 F.Supp.2d 463 (M.D.N.C.2006).

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA FILED JULY 12, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:04CV00151

CODY HASTINGS MASSASOIT, as Ancillary Administrator of the Estate of Tallas Hastings Tomeny, and STEPHEN PHELPS,

Plaintiffs,

v.

LANE CARTER, in his official capacity as Sheriff of Moore County, RANDALL BUTLER, in his individual and official capacity as a Deputy with the Moore County Sheriff's Office, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants.

MEMORANDUM OPINION AND ORDER

Eliason, United States Magistrate Judge.

This case arises out of tragic events that unfolded on the day of February 23, 2002 in Moore County, North Carolina. On that date, defendant Moore County Deputy

Appendix B

Sheriff Randall Butler shot and killed Tallas Tomeny and shot and seriously wounded plaintiff Phelps, both Green Beret Special Forces soldiers. Tomeny's claims are brought by his father, Cody Massasoit, who is the administrator of his estate. Defendant Carter is the current Sheriff of Moore County, and defendant Fidelity is the surety on a bond that sheriffs are required to post under North Carolina law. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and state law-the main assertion being that defendant Butler employed excessive force. Defendants seek dismissal of the action for a number of reasons.

I. Facts

The facts surrounding this most unfortunate incident were witnessed directly by Phelps, Butler, and a man named Charles Leiber. While their testimony concerning the events they witnessed is similar in some ways, it is also different as to certain important facts. For this reason, the Court will set out the facts as related by each of them.

A. Phelps' Facts

Plaintiff Phelps enlisted in the Army in 1995 and served for several years before being selected for training as a Green Beret with the Special Forces. (Phelps Dep. p. 28) In February of 2002, he and Tallas Tomeny were soldiers involved in a Special Forces training exercise known as "Operation Robin Sage." Robin Sage has been conducted for more than forty years

in Moore County, North Carolina, and adjacent counties. During the 2002 Robin Sage exercise, the soldiers parachute into the area, set up a base camp at a local farm, and then join with "friendly" civilian volunteers to attempt to overthrow the government of a fictional country known as "Pineland." The exercise is quite detailed, with participants even being issued Pineland currency known as "don." The soldiers and civilians are expected to remain in their roles throughout the exercise and the soldiers attempt to accomplish their missions, avoid capture, and retain possession of their weapons. (*Id.* pp. 69-90) Law enforcement officers sometimes participated in the training. (*Id.* p. 89)

On February 23, 2002, Phelps and Tomeny left their base camp for reconnaissance on a railroad bridge. They received a ride from Leiber, who was a civilian assisting the military in his free time. Leiber drove a Ford Ranger pick-up truck with Tomeny giving directions in the passenger seat. (Leiber Dep. pp. 29-31) Tomeny possessed a backpack containing various items, including the two halves of an M-4 assault rifle. The rifle was in the main compartment of the backpack. (Phelps Dep. p. 188) Phelps rode in the bed of the truck with a tackle box and two fishing rods. All wore plain clothes. Their "cover story" was that they were a farmer and two migrant workers looking for a place to fish on their day off. (Leiber Dep. pp. 34-36)

At some point, the men passed a patrol car driven by Butler. When they later passed him a second time, Butler initially followed them and then activated his blue

lights in order to stop the truck. Leiber pulled off the road and into a church parking lot. A few days earlier, Phelps was involved in an incident where a group of soldiers had been stopped by local law enforcement and reacted poorly. He believed that the stop by Butler was "set up" to see how they reacted to being stopped. (Phelps Dep. pp. 162-163, 172-173, 182-183)

Butler parked his car eight to ten feet behind the truck, ran the license plate of the truck and then approached Leiber. Leiber produced his license and went to the front passenger seat of Butler's car. Butler and Leiber talked for some time in the car, but could not be heard by Phelps and Tomeny. (*Id.* pp. 175-177) Butler eventually left Leiber in the front seat of the car and approached Tomeny's side of the truck. Phelps was sitting/lying in the passenger side of the bed of the pickup with his back against the cab and his eyes mostly closed. He pretended to be asleep, but had his eyes open enough to see. (*Id.* pp. 181-182)

Tomeny told Butler they were migrant workers going fishing on their day off. Butler asked Tomeny to exit the truck and to bring the backpack with him. Tomeny followed his training and tried to bribe Butler with some of the "don" that he was carrying, but Butler did not acknowledge him. (*Id.* p. 184) Eventually, Butler and Tomeny ended up at the rear of the truck with the tailgate down. Butler was standing toward the driver's side of the truck and Tomeny was toward the passenger side. The backpack was between them. (*Id.* pp. 181-182, 195) Phelps, still pretending to sleep, and Leiber watched

from their respective positions in the bed of the truck and the patrol car.

Butler was interested in the backpack and asked Tomeny to open it. Tomeny opened some of the smaller outer compartments of the backpack and removed such items as a thermos, gloves, a T-shirt, a black toboggan, and a meal-ready-to-eat (MRE). (*Id.* p. 186) He also continued to try to bribe Butler by showing the don and saying things to the effect of: "It does not have to be this way. We can work together and make I neland a good place. Our governments can work together." Butler did not respond, but kept asking to see inside the backpack. (*Id.* pp. 182-184, 278) Tomeny responded by stalling: turning the bag upside down and pretending he did not know how to open it. The zipper to the main compartment with the M-4 rifle was covered by a flap and Phelps maintains that Tomeny never opened that zipper. (*Id.* pp. 191-192, 196)

According to Phelps, Butler eventually got upset and grabbed the bag away from Tomeny. At one point, Tomeny was pulled off balance toward Butler. Butler was able to wrest the backpack from Tomeny with his left hand and throw it across his body to the ground near the front driver's side wheel of the patrol car. (*Id.* pp. 197-199) He also pushed Tomeny back. Phelps claims that Butler then drew his pistol with the safety off. Tomeny had his hands up. Butler reholstered the pistol, pulled his pepper spray, and began spraying Tomeny in the face. (*Id.* pp. 200, 207-208) Tomeny backed away, toward the passenger side of the truck, while screaming and cursing.

Appendix B

The truck had side boards on the bed rails and Tomeny largely passed out of Phelps' view behind the boards as he backed up. (*Id.* pp. 205)

Phelps, not wanting to be pepper sprayed, stood, jumped out of the back of the truck, and ran to grab the backpack. He believed that all of this was still part of the training exercise. Therefore, he intended to grab the backpack and run to the edge of the woods to distance himself from Butler and formulate a plan. (*Id.* pp. 207) Instead, he heard two rapid shots behind him. He tried to stop and turn, but slipped on the wet pavement and fell. After landing on all fours, he saw Butler turn to face him and he heard two more shots. (*Id.* pp. 220-221, 241-243) One of the last two shots hit him in the right arm; the other hit him in the chest. The bullet that hit his chest punctured his diaphragm, liver and intestines before lodging in his left hip. (*Id.* p. 243) As Phelps lay on the ground, Butler approached him. Phelps cursed him and asked how he could not know they were in the military. Butler allegedly told him to shut up and stay down or he would shoot him again. (*Id.* p. 248)

Tomeny had been shot in the chest and was pronounced dead at the scene. Phelps was hospitalized for thirteen days. He has largely recovered from his wounds and remains on active duty in the Special Forces. However, he has permanent damage to the ulnar nerve in his right arm, slightly decreased lung capacity and liver function, and a heightened risk of blockage in his colon at the point where it was resected. (*Id.* pp. 304-310)

Appendix B

B. Leiber's Facts

Leiber's rendition of the facts is not materially different from Phelps' to the point that they were stopped by Butler. He states that he drove as Tomeny gave directions, but that he did not pay close attention to what Tomeny was doing or see Butler until shortly before he pulled them over. He does add that when Butler pulled in behind them, Tomeny told him to "lose him." Leiber then made a couple of turns, but Butler stayed with him and then pulled him over. (Leiber Dep. pp. 39, 210-211)

The first significant addition or difference begins at the point that he and Butler entered the patrol car. Leiber claims that Butler questioned him as to where he lived and what he was doing and he replied that he was from Pineland and that the men in his truck were two migrant workers who were going fishing. He claimed to have picked them up in Pineland. In response to further questioning, he stated that the men were doing "recon." (*Id.* p. 44)

After Butler left the patrol car, Leiber could watch the subsequent events, but heard very little. He watched as Butler got Tomeny out of the truck and had him place the backpack on the tailgate. He then observed Tomeny take items out of the bag. (*Id.* p. 53) He testified in his deposition that when it "appeared" Tomeny was not going to show any more of the contents of the bag, Butler pulled out his pistol and then reholstered it. He states that Tomeny responded by pulling an orange from the

bag. (*Id.* pp. 53-54) Leiber does not remember anyone opening the main compartment of the backpack. (*Id.* p. 61) Butler and Tomeny then exchanged a few words before both reaching for the bag.

Leiber stated that both men were "getting ill" and a tussle over the bag followed. Butler responded by pulling his pepper spray and spraying Tomeny directly in the face from a distance of about sixteen or seventeen inches. Tomeny began "hollering" and "shaking his head" with pepper spray streaming from his face as he retreated around the passenger side of the truck. (*Id.* pp. 54-55, 86, 251) Leiber noted that Butler was yelling across the radio for back up as he was spraying. Leiber claims Butler just kept spraying him until the pepper spray appeared to run out. (*Id.* pp. 55) Leiber does not remember ever observing Tomeny's hands reach behind his back. (*Id.* p. 256)

According to Leiber, when the pepper spray seemed to run out, Butler immediately pulled his pistol and fired two shots at Tomeny. At that time, Phelps jumped off of the truck and ran. Leiber stated in his deposition that he was unsure where the backpack was when Phelps ran. (*Id.* pp. 54-55, 253) Phelps was then shot, but Leiber could not see him or see what he was doing until after he was shot. (*Id.* p. 55)

Appendix B

C. Butler's Facts

On February 23, 2002, Butler was on patrol in northern Moore County. While he had general knowledge that the military sometimes trained in Moore County, he did not know of the existence of the Robin Sage exercise, did not know its details, and did not know that any exercise was being conducted in the area that day. (Butler Dep. pp. 19-20, 417-419) He had, however, heard that there had recently been a series of property crimes in the area, including burglaries of homes and outbuildings. (*Id.* pp. 176-177)

While driving, Butler passed Leiber's pick-up truck pulled over on the side of the road with "someone or something" in the back. He simply noted the presence of the truck, but did not stop. (Id. pp. 193-194) About an hour and a half later, while parked at an intersection, he observed the truck drive by. Butler testified at his deposition that he made eye contact with the person in the passenger seat (Tomeny) and that Tomeny responded by ducking down and pushing a large object from his lap to the floor. Butler also saw a man riding and sleeping in the back of the truck. He considered this unusual given that the weather was chilly. (*Id.* pp. 200-201)

After Butler made eye contact with the passenger, the truck made an immediate right turn. He decided to follow it. The truck then made a turn onto a road that loops around less than half a mile and almost returns to the place where he first saw the truck. Because of (1) the unsolved property crimes in the area, (2) seeing the

same truck in the area earlier in the day with a person riding in the back and apparently asleep in cold weather, (3) the actions of the passenger, and (4) the turns that the truck made after being sighted and followed, Butler became suspicious and pulled the truck over. (*Id.* pp. 201-203)

Butler spoke with Leiber and asked him to come to the car. Leiber complied. In the car, Butler looked at Leiber's license and asked if Leiber was from the area. He said that he was not. According to Butler, Leiber told him first that he and his passengers were going fishing, then added that they were migrant workers. When asked which it was, Leiber allegedly replied that he was trying to find work for migrant workers. Butler thought this answer*469 to be odd because it was winter and there were no crops in the fields. Finally, Leiber told Butler he was "on a recon." (*Id.* pp. 216-218, 236, 278)

At this point, Butler left Leiber in the car and approached Tomeny's window. As Tomeny rolled down the window, Butler noticed the backpack on the floor of the truck and felt that Tomeny was uncomfortable and trying to hide the bag. He asked Tomeny to step out and show him the contents of the bag. He also noticed that Phelps continued sleeping or pretending to sleep and considered this suspicious under the circumstances. (*Id.* pp. 218-219)

Butler does not recall any attempt by Tomeny to bribe him, but was instead focused on the backpack. He asked Tomeny to open it and Tomeny said he would, but

did not. Butler testified in his deposition that Tomeny acted oddly by unzipping the bag halfway and then quickly zipping it closed again. Butler then unzipped the backpack himself and saw what he thought were two machine guns in the bag. (*Id.* pp. 219-220)

After Butler saw the guns, he and Tomeny struggled over the bag. Butler was able to take the bag from Tomeny and throw it near the front, driver's side tire of his patrol car. When he turned back, he claims that he felt and saw Tomeny' s hands near the pistol on his right hip. He then drew the gun with his right hand and pushed Tomeny away with his left while commanding him to stay back. When Tomeny did move away, Butler reholstered his gun, but he states that Tomeny moved toward him again. Butler then attempted to pepper spray Tomeny. (*Id.* pp. 251-253)

Butler believed that Tomeny turned his head, causing the pepper spray to miss him. He claims that he heard Tomeny yell, "It's too late. It's too late, you're dead." Tomeny then began pointing and saying "You're dead. You're dead." Finally, he yelled to Phelps, "Go ahead. Shoot him. Kill him; kill him." He also screamed "Kill him now." (*Id.* p. 253) Phelps then got up from the truck, jumped out, and rushed toward the backpack. Butler believed that Phelps was going for the guns and that he actually saw part of the guns come out of the bag as Phelps grabbed it and turned to face him. He states that he also saw, with his peripheral vision, Tomeny reaching behind his back as if to pull something from his pants. Butler claims he warned Phelps verbally but,

when Phelps did not respond, he then shot Phelps. After shooting Phelps, he turned to face Tomeny. Because Tomeny was still reaching behind his back as if for a weapon, he shot Tomeny and retreated to the back of the car where he could cover Leiber while calling for backup. (*Id.* pp. 253-255, 302, 315)

II. Claims

Based on their version of the facts, plaintiffs filed suit against Butler in both his individual and official capacities, Lane Carter in his official capacity,[1] and Fidelity and Deposit Company of Maryland. They claim that Butler violated Tomeny and Phelps' rights under 42 U.S.C. § 1983 by stopping the vehicle in which Phelps and Tomeny were riding without sufficient reason to do so and then by using excessive force against them in violation of their rights under the United States Constitution. They also raise claims under North Carolina law for assault and battery and negligence. As to the Moore County Sheriff's Office, they allege it violated § 1983 by (1) engaging in a pattern or practice of allowing officers to use excessive force without supervision or consequences and that this pattern or practice led to plaintiffs' injuries and (2) the Sheriff's Office failed to properly train Butler in the use of force. Additionally, they assert that the Sheriff, as Butler's employer, is liable for his state law torts and directly

1. Carter was not actually Sheriff at the time of the shootings. However, because the suit is only against him in his official capacity, he is the named defendant in the suit, which is really against the Sheriff's Office.

liable for failing to train officers to recognize participants in the Robin Sage exercise. Finally, Fidelity is the surety on a statutory bond that is required of sheriffs in North Carolina under N.C. Gen.Stat. § 162-8. Defendants have moved for summary judgment as to all of plaintiffs' claims.

III. Legal Standards

Summary judgment will be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence in a light most favorable to the non-moving party. *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir.1990). When opposing a properly supported motion for summary judgment, the party cannot rest on conclusory statements, but must provide specific facts, particularly when that party has the burden of proof on an issue. *Id.* "The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, *in the form of admissible evidence*, that could carry the burden of proof of his claim at trial." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir.1993) (emphasis added).

As for plaintiffs' claims arising under state law, the Court must follow the rulings of the state's highest courts or, if state law is unclear, rule as it appears the highest state court would rule on the issue. *Private Mortg. Inv.*

Services, Inc. v. Hotel and Club, 296 F.3d 308, 312 (4th Cir.2002). The rulings of intermediate appellate state courts are strongly persuasive authority that will not be disregarded. *Assicurazioni Generali, S.p.A. v. Neil,* 160 F.3d 997, 1002 (4th Cir.1998).

IV. Discussion

A. Claims Against Butler

Because the potential liability of defendants Carter and Fidelity is largely derived from the claims against Butler, the claims against Butler will be discussed first. If he did not violate plaintiffs' rights or commit a state law tort against them, then the remaining defendants cannot be liable based on his actions or any part they played that led to those actions.

1. Initial Stop

Plaintiffs' first claim against Butler is their allegation that he violated their right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution when he stopped Leiber's truck without any legal justification. Butler responds that the stop of the truck was entirely proper and that, in any event, he is entitled to qualified immunity on this claim.

As for Butler's assertion of qualified immunity, a police officer is immune from claims brought under § 1983 unless his conduct violates "clearly established

statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Court's "first task is to identify the specific right that the plaintiff[s] assert[ ] was infringed by the challenged conduct." *Wilson v. Layne,* 141 F.3d 111, 114 (4th Cir.1998). The second is to "determine whether that right was clearly established at the time of the incident." *Vathekan v. Prince George's County,* 154 F.3d 173, 179 (4th Cir.1998). Finally, if the right was clearly established, the Court must decide whether a reasonable officer could have believed that his actions were objectively reasonable in light of the circumstances. *Id.; Rowland v. Perry,* 41 F.3d 167, 173 (4th Cir.1994).

It appears the right asserted by plaintiffs is the right not to have the vehicle they were riding in stopped without reasonable suspicion that they were involved in criminal activity. Butler has not argued this right was not clearly established at the time he stopped Leiber's truck, but only claims that the stop was legal, or at least a reasonable officer in his position could have thought the stop was legal.

In support of his claim that the stop of the truck was legal, Butler points to six facts: (1) the unsolved property crimes in the area, (2) his multiple sightings of the truck in the area that day, (3) the unusual fact that Phelps was sleeping or pretending to sleep in the back of the truck in cold weather, (4) Tomeny ducking down and trying to hide an object that had been in his lap when he made eye contact with Butler, (5) the turn the truck made

immediately after Tomeny saw Butler, and (6) the later turns the truck made after Butler followed it. (Butler Brf. p. 10) He asserts that an officer faced with these facts could reasonably conclude that the occupants of Leiber' s truck were "casing" targets for future robberies.

Plaintiffs attempt to counter Butler's argument by first noting that the truck violated no traffic laws and had a current and valid inspection sticker and registration. This is not in dispute, but it is also not relevant. Butler makes no claim that he stopped the truck because it violated a traffic law or was not properly registered or inspected.

Next, plaintiffs challenge certain of the facts that Butler relies on to establish reasonable suspicion. They describe Butler's reliance on "a rash of property crimes" as a "fabricated, after-the-fact explanation" for the stop. (Pl. Brf. p. 9) They report that a review of the files from the Moore County Sheriff's Office "shows no upswing in property crimes in the northern part of the county" at that time. (*Id.*) However, whether there was a statistical "upswing" in property crimes or not, Butler has testified that such crimes were occurring in the area. This testimony is supported by testimony from Robbins police officer Jerry Garner who describes some of the crimes and who himself accidentally stopped some Robin Sage participants while investigating those crimes. (Jerry Garner Aff. ¶¶ 4-5, 7-9; Jerry Garner Dep. Ex. 6)

Finally, plaintiffs challenge Butler's claims that Tomeny ducked and pushed an object from his lap to the floor. To do this, they rely on Leiber's deposition where he states that the backpack remained on the floor of the truck. However, Leiber also admitted that he did not closely watch Tomeny at all times and that he was looking at the road and rear view mirror. (Leiber Dep. pp. 211, 214) He specifically stated that he could not say whether or not Tomeny bent down at the time that they passed Butler. (*Id.*) At an earlier point, he claimed Tomeny may have bent down reaching for his seat belt. (Leiber Dep. p. 41) Therefore, at most, plaintiffs have raised a dispute as to whether Tomeny pushed the backpack down from his lap to the floor. Otherwise, Butler's proffered evidence remains unchallenged and the Court will use that evidence, minus the allegation that Tomeny pushed the bag to the floor, to determine whether an officer in Butler's place would have had a reasonable suspicion that plaintiffs and Leiber were involved in criminal activity.

The law is quite clear that Butler was justified in stopping Leiber's truck to speak with the occupants and ascertain their identities and intentions. Behavior suggesting that persons are traversing an area to "case" robbery targets has been held to justify an investigatory stop. *Terry v. Ohio,* 392 U.S. 1, 22-23, 88 S.Ct. 1868, 1880-1881, 20 L.Ed.2d 889 (1968). Butler's multiple sightings of the truck and Phelps' unusual presence in the bed would raise such suspicions here. Likewise, ducking in the presence of law enforcement officers and taking evasive maneuvers in a vehicle can also be factors

justifying further investigation. *United States v. Tate,* 648 F.2d 939, 942 (4th Cir.1981)(attempting to hide face from law enforcement is suspicious behavior); *United States v. Smith,* 396 F.3d 579, 584-586 (4th Cir.2005) (evasive acts in a vehicle is suspicious behavior). While all of the behaviors Butler witnessed are behaviors that can have innocent explanations, taken together they also suggest that criminal activity could certainly be afoot. The issue is not a close one. At the very least, a reasonable officer in Butler's position would have certainly have believed that he would be justified in investigating the behavior he witnessed. Butler is entitled to summary judgment on this claim both directly and on his assertion of qualified immunity.

2. Shooting

Plaintiffs' central claim is that Butler used excessive force when he shot Tomeny and Phelps. They assert that this violated their rights under the Fourth Amendment of the United States Constitution and § 1983. As with the prior claim, Butler argues that he is entitled to summary judgment directly and on the basis of qualified immunity.

Excessive force claims stemming from investigatory stops are controlled by the Fourth Amendment's prohibition against unreasonable seizures. *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). Because the Fourth Amendment is premised on the idea of "reasonableness," the Court must determine whether a particular level of force was

objectively reasonable given the particular circumstances in a case. Plaintiffs' claim is that the deadly force used against them was objectively unreasonable given the facts in this case. Again, the parties appear to agree on the basic law of the case-that is, that plaintiffs had an established right not to have deadly force used against them unless a reasonable officer in Butler's place could have believed they posed a serious threat to his safety or the safety of others. *See Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985). The difference between them is whether such an officer could have thought this based on the facts here.

Cases such as the one at bar epitomize the particular difficulties in which police officers often find themselves. The United States Supreme Court has summarized the situation in the following manner:

> Because 'police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation,' the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene. *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim, 'requir[ing] careful attention to the facts

> and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.

Saucier v. Katz, 533 U.S. 194, 205, 121 S.Ct. 2151, 2158, 150 L.Ed.2d 272 (2001) (citations omitted).

Butler's argument that he acted reasonably in shooting Phelps and Tomeny is based essentially on his facts as set out above. They are, to summarize, that (1) Phelps, Tomeny, and Leiber acted oddly, (2) Tomeny stalled in opening the bag, (3) Butler then opened the main compartment himself, saw the assault rifle, and threw the bag near his car, (4) Tomeny made physical contact with him, so he pulled his gun on Tomeny and then reholstered it and tried to spray Tomeny to keep him away, (5) Butler believed the spray missed Tomeny, (6) Tomeny yelled for Phelps to kill Butler and Phelps then grabbed the bag and turned to face Butler, (7) Phelps was trying to remove the rifle from the bag as Tomeny reached behind his back, and (8) Butler warned Phelps to stop before shooting Phelps and then Tomeny, while they remained in these threatening positions.

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Plaintiffs counter that Butler's facts are neither undisputed, nor stated in a light most favorable to plaintiffs. They set out the following list of points that they claim are in dispute: (1) whether Butler saw the gun in the backpack, (2) whether Tomeny ever touched Butler or reached for Butler's pistol, (3) whether Tomeny was hit and incapacitated by the pepper spray, (4) whether Tomeny yelled for Phelps to kill Butler, (5) whether Tomeny reached behind his back, (6) whether Phelps or Tomeny was shot first, (7) whether Phelps slipped and fell as he ran, (8) whether Phelps was taking the rifle out of the bag when shot, (9) and whether Butler warned Phelps before shooting him.

In his reply brief, Butler asserts that all of these facts are either immaterial to the key legal issues in the case or are actually not in dispute. The Court finds that his assertion of immateriality appears correct, but only as to certain items. For instance, whether Phelps fell or intentionally knelt behind the bag, whether he actually tried to remove the rifle or was simply in a position to do so at a time when it would have appeared that was his intent, whether Butler gave a verbal warning before shooting, and who was shot first matter little, if at all, if the other facts are as Butler claims. Even somewhat more important facts, such as whether Tomeny touched Butler or whether Tomeny was hit by the pepper spray would not appear, by themselves, to carry controlling weight in the case. Instead the case really turns on disputes about whether Butler did or did not see the gun, whether Tomeny yelled for Phelps to kill Butler just before Phelps ran to the backpack, and whether Tomeny

was reaching behind his back at the time he was shot. The Court will examine these three issues further, construing the evidence in the light most favorable to plaintiffs.

Taken as a whole, Phelps' deposition testimony indicates that Butler did not see the gun because he could not have seen the gun without the main compartment of the backpack being opened. Phelps describes being in a position to see whether this occurred and states clearly that it did not.

Butler attempts to negate Phelps' testimony in two ways. First, he points out that Phelps did not report the fact that the main compartment of the bag was not opened to earlier investigators in the case and that he allegedly told an Army interviewer that he did not know whether Butler saw the rifle before the shooting occurred. This line of argument has some relevance, but is not sufficient. Initially, it is not clear why Phelps would have been expected to spontaneously report that an event did not occur, nor, for the most part is it clear that he was asked if it did. The exception is an interview conducted by Lieutenant Colonel Robert McEachern, who questioned Phelps about the incident while Phelps was still in the hospital recovering from his wounds. In his notes from that interview, McEachern did state that Phelps did not know whether Butler saw the rifle. (Phelps Dep. Ex. 5 p. 1)

There are a number of readily apparent problems with Butler's use of the statement: it is a hearsay

statement from McEachern, Phelps was not under oath, he was sedated at the time it was given, it is not clear what questions were asked of Phelps by McEachern to elicit the answer set out in the report, and it is not clear from the report that Phelps knew the precise moment in time being referred to or that the moment was the one just before the struggle over the bag occurred. *Id.* The bottom line is that Butler is attempting to use an unclear, unsworn statement purportedly made by Phelps to contradict Phelps' sworn deposition testimony. This is not permitted at summary judgment. *Vathekan v. Prince George's County,* 154 F.3d 173, 180 (4th Cir.1998).

Butler attempts to work around this problem by noting that Phelps was shown McEachern's report at his deposition and asked whether he disagreed with the report. (Phelps Dep. pp. 301-303) He replied that he disagreed with a section of the report that stated that he got behind the patrol car, heard two shots, and then got up to run. He noted no other specific disagreements with the report. Butler would apparently have McEachern's report become Phelps' testimony on the issue of whether or not Butler saw the gun because "[w]hen given the chance to do so at his deposition, Phelps did not disagree with this statement." (Butler Reply p. 4)

Unfortunately for Butler, the examination at the deposition was not nearly sufficiently complete for the Court to find that Phelps in fact essentially testified that he did not know whether or not Butler saw the gun. The exchange between Phelps and Butler's counsel

concerning the report was both brief and general. Counsel never asked specifically about the portion of the statement he now wishes to use to create an internal conflict within Phelps' deposition testimony. Without this type of questioning, there is no way to tell whether Phelps, in scanning the report after it was handed to him, even became aware of the comment about not knowing if Butler saw the gun. As will be discussed next, there were points in his deposition when Phelps was specifically questioned about whether Butler saw the gun and his testimony is quite clear that it was not possible for Butler to have seen it. Given the brief and general nature of the questions concerning the report, the information in the report cannot be used by Butler to create a conflict with Phelps' responses to more specific questions. Moreover, even if some ambiguity were established, it would not be appropriate to resolve the conflict at the summary judgment stage of the proceedings.

Butler's second attack on Phelps' testimony is more direct. He notes correctly that lay witnesses cannot testify to events about which they do not have personal knowledge. Fed.R.Evid. 602. He then asserts that Phelps was "sitting with his head down and eyes closed in the truck on the opposite side of the bag from where Butler was standing" and that Phelps "admits that he could not see what Deputy Butler could see and that he does not know what Butler saw." (Butler Reply p. 4, citing Phelps Dep. pp. 170, 181-182, 195, 299-300, 350) These characterizations of Phelps' testimony are overly narrow and somewhat inaccurate.

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Phelps' most specific testimony on his positioning is actually that he was sitting five feet from the bag, perpendicular to where Butler and Tomeny were standing and that the bag was between the three of them. (Phelps Dep. pp. 181, 195) He agreed that he was looking at different side of the bag than Butler, but rejected the characterization of his position as "opposite." (*Id.* p. 195) More importantly, he testified that his eyes were "squinting" as he pretended to be asleep. (*Id.* p. 182) When asked directly if his eyes were closed, his response was, "Not to the point where I couldn't see. . . ." "Only to the point where I could still see, but from a couple of feet away, it appears as though your eyes were closed." (*Id.* p. 350) The bottom line is that, however Butler may wish to describe Phelps' testimony, Phelps' positioning and the aperture of his eyes was such that he easily satisfies the personal knowledge requirements of Rule 602.

There is also the question of whether Phelps can specifically testify that Butler did not see the gun in the backpack. It is true that Phelps made a literal statement that he could not see what Butler saw and did not know what Butler saw. However, it is also undeniably true that when read in context, Phelps' testimony is that while he does not know what Butler did see, he knows that it was not the gun in the backpack. Phelps' deposition testimony is unequivocal on this point and he has explained the basis for his testimony.

Phelps stated that the bag was in Tomeny' s possession, that he was turning it over pretending to look

for the zipper to the main compartment and stalling, and that Butler became upset and tried to take the bag. (*Id.* pp. 191-193) The following exchange then ensued:

> Q. (By Mr. Wood) Do you know if Deputy Butler saw inside the main compartment of the bag
>
> **A. No.**
>
> Q. You don't know if he did or not?
>
> **A. Tallas was turning the bag, looking for the zipper. At the point where it was pulled initially, if the bag had been opened, the contents would have fallen out. At the point where he went for it a second time and got ahold of it, there was nothing significant that happened from the first time. And that action the second time, pulling it away and throwing it, didn't result in a pause and a look.**
>
> Q. There was an automatic weapon inside of the bag; correct?
>
> **A. Yes.**
>
> Q. Do you deny-Well let me ask you this: Do you have any reason to dispute Deputy Butler's testimony that he saw inside the bag and saw what he thought to be two machine guns?

A. Yes.

Q. Why do you dispute that?

A. Because prior to reaching for the bag the first time, Tallas had the bag, looking for the zipper, upside down looking, turning. If the bag had been opened, the contents would have fallen out. Nothing happened between the first and second reach for the bag, other than push, grab again.

Q. Okay. Well let's back up because you've talked about two grabs, and I'm not sure I understand that. Explain to me-when you say that Deputy Butler first got upset, what do you mean when you claim he got upset? When did that happen?

A. When he reached for the bag from Tallas.

Q. Okay. Do you know what Deputy Butler saw?

A. Do I know—

Q. Were you in any position-are you in any position today to dispute what Deputy Butler claims he saw?

MR. MAHONEY: Objection

A. I was sitting five feet away.

Q. (By Mr. Wood) Were you on the opposite side of the bag [from the one] that Deputy Butler was [on]?

A. No. The bag was between myself and the two of them.

Q. But he's looking at one side of the bag and you're looking at the other; correct?

MR. MAHONEY: Objection

A. Yes.

Q. (By Mr. Wood) Could you see what Deputy Butler could see?

A. No.

Q. Were you standing where Deputy Butler was standing?

A. No, I was not.

Q. So, if Deputy Butler saw what he thought were two machine guns inside the bag, do you have any reason to dispute that he was able to see inside the bag, at least see some portion of the M-4?

A. Yes.

Q. And again, I ask you why do you say that?

A. Because just prior, Tallas had the bag. He was turning it. He turned it upside down. He's still looking for the zipper. Tallas still has control of the bag. If the bag had been open, parts, pieces, stuff that was in the bag would have fallen out.

The bag's dark inside. An M-4 is all black. To see in there, one, it's not open, but to see all black in a bag that's not open because the contents would have fallen out when they were upside down, yes is my answer.

Q. Well, does the bag have to be completely open in order to be able to see inside of it?

A. A bag would have to be open to a specific number of inches along the zipper or the line of the zipper to see inside of it.

Q. Did you see Lieutenant Tomeny open and close the zipper on more than one occasion?

A. Open and close the zipper for the main compartment?

Q. Correct.

A. No.

Q. You didn't see that?

A. No.

Q. So your testimony today is that there's no way possible that Deputy Butler could have seen inside the bag?

A. Yes.

Q. That's your testimony today? And that the bag contained an automatic weapon?

A. Are you asking me if the bag contained an automatic weapon?

Q. I'm asking you if the bag contained an automatic weapon.

A. Yes, it did.

Q. And so you're saying that sitting from an opposite side of the bag five feet away, pretending to be asleep, and not standing

where Deputy Butler was standing, you're positive there's no way you could have seen inside that bag and seen some portion of that automatic weapon?

MR. MAHONEY: Objection. Answer the question.

A. Yes.

(Phelps Dep. pp. 193-197)

Thus, Phelps repeatedly stated that Butler could not have seen the gun in the backpack and provided logical reasons why this was so. He concluded the sequence above by affirming that he was "positive" that Butler could not have seen the gun. Not only this, but Leiber testified in his deposition that he never saw anyone open the main compartment of the backpack. (Leiber Dep. p. 61) In contrast, Butler claims that he unzipped the backpack himself and saw the weapons. Nothing in Phelps' or Leiber' s testimony supports that scenario. Thus, a true issue of material disputed facts remains as to whether Butler saw the gun in the bag prior to pepper spraying Tomeny and shooting Tomeny and Phelps.

The second time Butler claims to have seen the weapon was when Phelps allegedly grabbed the bag and tried to remove the weapon. This could pose a problem for plaintiffs even if Butler did not initially see the gun in the bag when tussling with Tomeny, especially if the jury should find that Tomeny was yelling for Phelps to

kill Butler. However, the evidence on this issue is clearly disputed. Phelps denies he ever reached in the bag and pulled out the weapon. (Phelps Dep. p. 217) He claims he grabbed the bag and was running away when he heard Tomeny being shot, landed on all fours as he slipped while stopping, turned toward the gunfire, and then was immediately shot himself. (*Id.* pp. 221, 242-243).

The second important factual dispute is over whether or not Tomeny yelled that Butler was dead and told Phelps to kill Butler. According to Butler, when he attempted to pepper spray Tomeny, the spray missed and Tomeny began yelling "It' s too late. It's too late, you're dead." He then pointed in an unspecified direction and said "You're dead. You're dead." Tomeny allegedly yelled to Phelps, "Go ahead. Shoot him. Kill him; kill him," and also screamed "Kill him now." (Butler Dep. p. 253) It was at that point that Phelps got up, leapt from the truck and grabbed the backpack. (*Id.*)

Phelps' deposition testimony concerning this portion of the incident is different from Butler's rendition. He believed Tomeny was hit by the pepper spray based on his reaction. Phelps related that Tomeny was speaking loud enough for Phelps to hear and that he heard Tomeny cursing and saying something "in the nature of," " 'What are you doing? Stop,' with profanity mixed in." (Phelps Dep. p. 210) Phelps could not hear what Tomeny was saying otherwise, but specifically denied that he ever heard Tomeny say, " 'Shoot Mr. Butler.' " *Id.*

In his reply brief, Butler characterizes his testimony on this point as "undisputed." He does so based on the fact that Phelps admitted that he did not hear all of the words uttered by Tomeny. However, as with McEachern's report, the questioning of Phelps in his deposition is not sufficient for Butler to prevail on this point. The questioning certainly establishes that Tomeny uttered some words that Phelps was able to hear and other words that he was not able to hear. It also makes clear that Phelps never heard Tomeny say the exact words "Shoot Mr. Butler." Still, he was not asked whether or not he heard the more extensive statements testified to by Butler.[2] More importantly, Phelps was not asked whether the words he could not understand could have been those testified to by Butler or even whether the length of the words he could not understand would have been similar in length to the statements testified to by Butler. It is just not clear from the record in front of the Court whether Phelps missed a word here and a word there, or whether he would agree that Tomeny made extensive statements that he could not understand.

Due to the state of the record before it, the Court is left with Butler testifying that Tomeny repeatedly yelled

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2. At various times in his deposition, Butler and the attorneys make reference to the "shoot him" or "kill him" statements alleged to have been made by Tomeny. They vary in length and detail. However, Butler made it clear that, whatever the exact nature of the phrases he contends Tomeny yelled, the phrases added together to form a statement of some length, because Tomeny repeated it "over and over and over." (Butler Dep. p. 299)

for Phelps to kill Butler and Phelps testifying that, although he was in a close proximity with and could hear Tomeny, he did not hear any order to shoot Butler. Not only this, but he reports having heard different words from Tomeny altogether. In other words, Phelps says he did not hear what Butler claims to have heard and Butler appears not to have heard what Phelps claims to have heard. For this reason, the differences in their testimony is not merely a matter of one witness hearing everything that was said and one hearing only parts. The two men report hearing very different utterances which do not match at all. It is not as if the statements heard by Butler simply "fill in the blanks" of Phelps' testimony. Not only this, but it is worth noting that Butler claims that Tomeny was pointing as he told Phelps to shoot Butler. Neither Phelps nor Leiber reports having seen this gesture.

In the end, viewing all of the evidence in the light most favorable to plaintiffs, Phelps was in a place where he could have heard Tomeny yelling for him to kill or shoot Butler and he did not hear this. In instances such as this, the Court cannot simply ignore the fact that a witness did not hear something that they should have heard. The Fourth Circuit has found summary judgment inappropriate in similar circumstances. *See Clem v. Corbeau*, 284 F.3d 543, 551 (4th Cir.2002)(defendant officer reported hearing threat, but another officer and a witness in same breakfast nook as person alleged to have made the threat did not hear one); *Vathekan v. Prince George's County*, 154 F.3d 173, 180 (4th Cir.1998)(witness' sworn statement that he did not hear

a warning before a police officer released a police dog created a dispute with officer's claim a warning was given where witness was in position to hear a warning, but did not). It is likewise inappropriate here.

Finally, there is a dispute between the parties as to whether or not Tomeny was reaching behind his back at the time he was shot. Butler has very clearly testified, not only that he was, but that he did so for at least more than a brief instant. Butler claimed in his deposition that, after Phelps ran and grabbed the bag, Tomeny began reaching behind his back as if trying to get something out of his pants. He continued to do so as Butler turned, warned Phelps, shot Phelps, and then turned again to face Tomeny. (Butler Dep. pp. 254-255, 309-311, 317) This contrasts with the testimony of Leiber, who was seated in the patrol car when Tomeny was shot. He testified in his deposition that Tomeny's hands were up in the air when he was being pepper sprayed, that he was shot first-i.e. without Butler first turning to shoot Phelps-and that his hands were over his face at the time he was shot. (Leiber Dep. pp. 54, 60, 250-251, 256) He specifically stated that he did not see Tomeny reach behind him. (*Id.* p. 256)

Butler tries to argue that the differences in his and Leiber' s testimony can be dismissed as differences in "perception" because Leiber has made statements that Tomeny was "turning, twisting and hollering" before he was shot.[3] Butler describes this as consistent with his

3. In support of his "perception" argument, Butler cites the case of *Anderson v. Russell*, 247 F.3d 125 (4th Cir.2001), which (Cont'd)

own version of events. This is simply not the case. Whatever twisting, turning, and hollering Tomeny may have been doing prior to being shot, Leiber is clear that his hands were in the air or on his face, that he never saw them behind his back, and that they were on his face when he was shot. Butler testified that Tomeny's hands were behind his back for some time before he shot him. This is not merely a difference in perception. Both witnesses were in a position to clearly see Tomeny's hands and they have testified that the hands were in very different locations. A dispute of fact exists and will have to be decided by a jury.

In conclusion, plaintiffs have failed to show that Butler's stop of Leiber's truck was improper. However, there are genuine factual disputes over whether Butler saw the gun in the backpack prior to shooting Tomeny and Phelps, whether Tomeny ever shouted for Phelps to kill or shoot Butler, and whether Tomeny was reaching behind his back prior to and at the time he was shot. Butler could not and has not argued that he would be entitled to summary judgment, either directly or based on qualified immunity, if these issues were decided

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(Cont'd)
in turn cites to *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir.1998). These cases are distinguishable because they involved minor discrepancies and/or witnesses with viewpoints that were significantly less advantageous than those of the police officers. Here, Leiber was only a few feet further from Tomeny than Butler and was viewing him from roughly the same angle. The incident took place in daylight and nothing suggests that Leiber's view was obstructed.

against him. For this reason, his motion for summary judgment will be granted as to plaintiffs' claims that he improperly stopped the truck and denied as to their claims that he used excessive force.

3. State Law Claims

In addition to the claims under § 1983, plaintiffs have also raised claims against Butler for assault and battery and negligence. Butler has moved for summary judgment on these claims. However, he does so primarily on the basis that the force he used was reasonable and not excessive under the circumstances. *See Glenn-Robinson v. Acker,* 140 N.C.App. 606, 625, 538 S.E.2d 601, 615 (2000)(setting out standard based on excessive force for assault and battery claims against a police officer). For the reasons discussed in dealing with the excessive force claims above, factual disputes exist which preclude a determination on this issue at summary judgment.

As to the negligence claim, citing the case of *Hinton v. Raleigh,* 46 N.C.App. 305, 264 S.E.2d 777 (1980), Butler seeks dismissal by asserting that Phelps and Tomeny were contributorily negligent. In *Hinton,* a decedent was found to have been contributorily negligent when police shot him. However, he participated in an armed robbery, refused to surrender to police when ordered, and then crouched and pointed at the officers. *Id.* at 308, 264 S.E.2d at 779. Viewing the disputed material facts in the light most favorable to *480 plaintiffs in the present case, they may have acted suspiciously, but it is not established

that they engaged in conduct similar to or the equivalent of the decedent in *Hinton*.

Finally, Butler claims that the state law claims should be dismissed based on public officer's immunity. He agrees in his brief supporting his summary judgment motion that the analysis for this type of immunity is essentially the same as the § 1983 qualified immunity analysis. *See Lea v. Kirby*, 171 F.Supp.2d 579, 584 (M.D.N.C.2001). Therefore, just as Butler's qualified immunity claim failed on plaintiffs' excessive force claims under § 1983, his public officer immunity claim fails as to the state law claims.

4. Official Capacity Claims

Butler's only argument for dismissal of the official capacity claims against him is that they should be dismissed for the same reasons as the individual capacity claims. Of course, as already discussed, most of the individual capacity claims remain. To the extent that they do, Butler's reasoning as to the official capacity claims fails. However, because the official capacity claims are really claims against the Moore County Sheriff's Office they will be addressed further below.

Appendix B

B. Claims Against Defendant Carter

1. Section 1983 Claims

The official capacity claims against Butler and defendant Carter are effectively a suit against the Moore County Sheriff's Department itself. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985). In essence, plaintiffs seek to hold that entity liable based on Butler's employment as a deputy. However, while a defendant's employment with the government can eventually lead to § 1983 liability for his employer in certain circumstances, that liability cannot be based on the theory of *respondent superior* that operates in state law tort claims. Instead, there is governmental liability only when the government entity itself can be said to be at fault for the injury to the plaintiffs. This occurs when the violation of plaintiffs' rights is caused by an official custom or policy. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 692-695, 98 S.Ct. 2018, 2036-2038, 56 L.Ed.2d 611 (1978). Policy or custom can be found either in written form, in the form of decisions made by policymaking officials, or in the form of omissions by policymaking officials that show a deliberate indifference to the rights of citizens. *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir.1999)(citing various cases from the United States Supreme Court). The offending custom must be so widespread as to have the force of law. *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997).

Appendix B

Plaintiffs' amended complaint raises two possible theories for holding the Sheriff's Department liable under § 1983. The first of these is a failure by the Department to train Butler and other deputies in how to recognize and respond to persons involved in Robin Sage. At summary judgment, they have neither advanced this argument nor presented evidence to support it. They also explicitly concede their direct negligence action against Sheriff Carter based on a similar theory. (Pl. Brf. p. 5 n. 6) No further discussion of the theory is necessary.

The second theory raised in the amended complaint, and one that is pursued by plaintiffs at summary judgment, is that there was a history and pattern of unlawful traffic stops and uses of excessive force by deputies with the Sheriff's Department, that the Sheriff knew of these incidents, that he condoned the conduct by doing nothing, and that Butler's alleged conduct was in keeping with the custom and practice that developed in the Sheriff's Department as a result of the lack of action by the Sheriff.

In order to establish a claim based on allegations that a pattern or practice caused their injury, plaintiffs must show that (1) an unconstitutional custom or practice was so common as to have the force of law, (2) the responsible policy makers were actually or constructively aware of its existence, (3) they failed through specific intent or deliberate indifference to stop the practice, and (4) a sufficiently close causal link exists between the unconstitutional practice and the violation of plaintiffs' rights. *Spell v. McDaniel*, 824 F.2d 1380,

1390-91 (4th Cir.1987). As to the causation element, "failure to correct the known practices must be such as to make the specific violation " 'almost bound to happen, sooner or later,' " rather than merely " 'likely to happen in the long run.' " *Id.* at 1391.

Plaintiffs point to four incidents, two lawsuits, and lapses in paperwork procedures which they claim establish the necessary pattern or practice of unconstitutional acts in this case. However, as will be seen, such evidence falls far short of what is necessary.

The first incident is an arrest made on January 31, 2001 by Deputies Jimmy Smith and James Furr. According to the incident report filed in connection with the arrest and undisputed affidavits filed by defendant Carter and Deputy Furr, the deputies stopped a car in which a man named Thomas (Tommy) J. Shields was a passenger. He was well known because of a long history of drug addiction and criminal activity. This particular stop was made because the deputies were aware that a woman had claimed that "Tommy Shields" had assaulted her and another deputy had the warrant and was on his way. When the deputies relayed this information to Shields, he got upset and cursed them. They tried to arrest him, but he resisted, so they pepper sprayed him. Shields initially ran, but then surrendered when the deputies followed him. After the deputy with the warrant arrived, everyone realized that the warrant was actually for Shields' nephew, Thomas "Tommy" L. Shields. The deputies and Tommy J. Shields shook hands and everyone apologized for their mistakes. Shields never

filed a complaint regarding the incident. (Carter Ans. to Requests for Prod.; Carter Aff. ¶ 7; Furr Aff.)

There is no basis for using this to establish that excessive force was a custom or practice of the Moore County Sheriff's Department. Tommy Shields was pepper sprayed when he resisted officers who were trying to arrest him. It is true that the arrest itself was a mistake, but that is irrelevant to the excessive force inquiry before the Court and, moreover, if the mistake was a reasonable one, the arrest did not violate Shields' Fourth Amendment rights. *Hill v. California,* 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971). Plaintiffs have made no showing that the force used was excessive or that the mistake leading to the arrest was not reasonable under the circumstances. Also, Shields himself never complained about the incident.

The second incident occurred on May 12, 2001. Two officers responded to a report of a domestic assault. When they arrived, several people were present and they eventually arrested Lee Marsh and placed him in a squad car. However, a man named Brian Dowdy was angry with Marsh and was still trying to get to Marsh in order to assault him. Dowdy was warned to stay back, but persisted in trying to get to Marsh. A deputy then grabbed Dowdy and placed him against a car with his arm behind his back. When Dowdy calmed down, he was released, but later complained that his shoulder hurt. He was taken to a hospital where it was discovered that the shoulder was dislocated. It was not determined whether the injury occurred in an earlier fight that

apparently occurred with Marsh or when the officer grabbed him. Dowdy was cited and later pled guilty to resisting a public officer. He also never filed a complaint regarding the incident.

As with the first alleged use of excessive force, the actions of the officers in restraining Dowdy do not appear to have been excessive. Brian Dowdy was physically restrained by an officer, as he ought to have been, while actively trying to assault an individual who was already in police custody. The officer used no pepper spray or weapon and merely pushed Dowdy' s arm behind his back before releasing him when he calmed down. While Dowdy's shoulder was injured, the fact of injury alone does not show the force to have been excessive. Moreover, it is not clear whether the injury occurred as a result of the use of force by the officer, as opposed to the earlier fight. Dowdy also did not file a complaint and pled guilty to resisting a public officer. Plaintiffs cite nothing to show that pushing an assailant's arm behind his back is an excessive use of force when it is done to prevent a physical assault. (Carter Ans. to Requests for Prod.; Carter Aff. ¶ 8; Lineberry Aff.)

The third incident involved Butler himself and his arrest of David Brewer. Butler spotted an automobile with a flashing yellow light on top of it and occupied by four or five young males. Brewer, who was driving, took his eyes off the road, put his head out of the window, and shouted "pig, pig, onk, onk, onk [sic]." (Carter's Ans. to Req. for Prod. of Docs. No. 25 Incident Report) He did so while driving in a town and "rapidly approaching a

stoplight." (Butler Aff. ¶ 4) Butler stopped the vehicle and asked Brewer why he was yelling and not watching the road. Brewer denied knowing what Butler was talking about. Butler then detected an odor of alcohol coming from the vehicle and asked Brewer to step out so that he could determine whether it was Brewer who smelled of alcohol. As Brewer stepped out, Butler shut the door behind him. Brewer cursed Butler and told him that he had shut the door on his leg. Butler told Brewer not to yell provoking comments, that it was disorderly conduct, and that it made him look like "white trash or a punk." (*Id.*) Brewer then cursed Butler and bumped him with his chest.

Butler arrested Brewer for disorderly conduct and driving while impaired. In doing so, he grabbed Brewer's left arm and pushed him against the patrol car. Brewer resisted by attempting to turn back around to face Butler. Butler then forced him onto the sidewalk and arrested him. On the way to the station, Brewer threatened Butler several times. Brewer eventually tested positive for the presence of alcohol and was charged with driving while intoxicated. He was also charged with disorderly conduct and resisting arrest. (*Id.* ¶¶ 12-15) Later, after pleading guilty to resisting a public officer and disorderly conduct, Brewer approached Butler in a parking lot, apologized for his behavior, and promised to attempt to improve it. (*Id.* ¶ 15) There is no sign he ever filed a complaint about the incident.

None of these incidents show any constitutional violations. As for the specific incident involving Butler, the stopping of someone driving in a reckless manner, asking him to step out of the car to determine if an odor of alcohol is coming from him, and arresting him after he cursed and "chest bumped" the officer was reasonable under the circumstances. The purported shutting of the door on Brewer's leg was accidental. After that, Butler did not use pepper spray or weapons, but merely tried to arrest Brewer by grabbing his arm. When Brewer resisted and assaulted Butler, Butler forced him to the ground. Plaintiffs again cite no case showing this was excessive under the circumstances.

Finally, plaintiffs point to an incident recalled by defendant Carter in his deposition. He reported that Deputy Will Brooks stopped a male motorist who he mistakenly believed to have been involved in an armed robbery. Brooks ordered the man out of the car at gunpoint before realizing his mistake. He then allowed the driver to leave. A representative of the NAACP later came to the Sheriff's office to make a complaint. Carter spoke with her, explained the reason for the stop, and she departed without pursuing the matter further. As with the other incidents, plaintiffs make the bald, unsupported statement that excessive force was used, without citing any law to support their allegations. This is not sufficient. In any event, the incident actually occurred sometime after Carter became Sheriff in

December of 2002 and well after and Phelps were shot in February of 2002. (Carter Dep. pp. 11, 60-62)[4]

In addition to the four incidents, plaintiffs also note that Butler was once sued for using excessive force when he was a police officer in Sanford, North Carolina, that the Sheriff's Department hired him anyway, and that the Department was itself being sued in federal court at that time in an excessive force case.[5] Also, plaintiffs claim that the officers involved in the four incidents set out above failed to follow proper procedure by not filing use of force reports or recording citizen complaints. Plaintiffs allege that failing to follow proper use of force procedure created a laxity in the department that made the shooting and killing of arrestees "almost bound to happen sooner or later." *Spell*, 824 F.2d at 1391. The Court finds this argument attempts to reach much too far.

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4. It should be noted that the above descriptions of the four incidents are based on the incident reports, as well as some statements from depositions or affidavits. Plaintiffs' descriptions of the incidents in their brief are different, sometimes considerably so, in ways too numerous to address specifically. However, the differences exist because plaintiffs' account tended to sensationalize, mischaracterize, or render incomplete accounts of the incidents. They included inferences not supported by the record.

5. The case against Butler was settled over his objection. (Butler Dep. pp. 37-39, 42) The case against the Sheriff's Department resulted in a defense verdict in February of 2000. (Pl. Resp. to Carter's Mot. for Summ. Judg. p. 2).

Appendix B

Based on the four incidents, the two lawsuits, and the alleged failure to follow proper procedure, plaintiffs have constructed the following scenario. They say that Sheriff's deputies, including Butler, were engaging in excessive uses of force, that they were not filing proper reports, that the Sheriff at the time would have been aware of this by reading the incident reports that were filed, and that the Sheriff took no measures to stop the use of excessive force or compel his employees to file the proper reports. They also claim that the incident involving Butler and Brewer shows that Butler "has a mean temper and will explode when his authority is challenged." (Pl.Resp. p. 8) Plaintiffs conclude that this lack of supervision and rule enforcement by the Sheriff let his deputies know that they could use excessive force without fear of investigation or *484 discipline. Plaintiffs also address causation, stating that the Sheriff's failure to require uses of force to be reported in written form "would have led Butler to believe that he could pull his gun and use it without ever having to give an official justification for his actions." (Pl.Resp. p. 13)

The problems with plaintiffs' theory are obvious. They have not shown that any of the incidents involved a use of excessive force. Moreover, there is no evidence of a pattern or practice of unconstitutional behavior. As to improper procedure, at most, this shows a failure to follow policy on what paperwork needs to be completed. Plaintiffs fail to show sufficient prior examples of excessive force so that it could be inferred that the failure to file reports would lead deputies to believe that use of not just excessive, but extreme excessive force was

condoned. Finally, there is no proof whatsoever of causation. Even if excessive force was used in the three incidents preceding the events of this case, the force used was one deployment of pepper spray when a person resisted, two occurrences of putting someone's arm behind their back, and one instance of someone being forced to the ground. Nothing in plaintiffs' proposed evidence of past misconduct rises to the level of establishing a pattern and practice of arrest that would have led Butler to believe that he could use pepper spray and then shoot two people without having to justify his actions. *See Carter v. Morris*, 164 F.3d 215, 218-19 (4th Cir.1999)(accusations of unrelated violations don't prove sufficient connection to risk of a specific injury).

In addition to their excessive force/pattern or practice theory under § 1983, plaintiffs also seek to hold the Sheriff's Department liable for failure to train and supervise officers regarding uses of force. To prevail on this type of claim, plaintiffs must show that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Plaintiffs argue that the need for more training on the proper use of force was obvious based on the incidents already described. However, this theory fails for the same reasons as plaintiffs' general pattern or practice claim. Therefore, defendant Carter's motion for summary judgment as to the § 1983 claims raised against him will be granted.

Appendix B

2. State Claims

In addition to attempting to hold Sheriff Carter liable for Butler's alleged § 1983 violations, plaintiffs also seek to hold him liable on certain state law claims. One theory they pursue is that Carter is liable on the state law assault and battery and negligence claims against Butler on the basis of *respondent superior.* A second theory, which is raised in the amended complaint, is that the Sheriff's Office was directly negligent for failing to inform its employees that Robin Sage was occurring or train them on how to recognize Robin Sage participants. Plaintiffs have conceded their direct negligence claim and now pursue only the *respondent superior* claims based on Butler's actions.

Regarding those claims, Carter makes two arguments. The first is that Butler did not commit a tort, so that there is no basis for holding the Sheriff's Department liable. Of course, this argument does not prevail because it has already been determined that questions of fact remain regarding whether or not Butler committed any torts. Carter's second argument is that he is entitled to governmental immunity as to plaintiffs' intentional tort claims.[6]

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6. In seeking governmental immunity only as to plaintiffs' intentional tort claims, defendants implicitly concede that governmental immunity does not exclude plaintiffs' negligence claims. The reason for this appears to be based on the existence of certain insurance coverage that will be discussed below.

Appendix B

North Carolina law generally provides immunity for government entities if their employees commit torts while performing governmental functions. *Messick v. Catawba County, North Carolina*, 110 N.C.App. 707, 431 S.E.2d 489, 493-94, *rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). It covers both intentional and negligent acts. *Dickens v. Thorne*, 110 N.C.App. 39, 429 S.E.2d 176 (1993). This immunity may be waived through the purchase of liability insurance. *Messick*, 110 N.C.App. at 714, 431 S.E.2d at 493-494.

Plaintiffs do not dispute that, absent waiver, governmental immunity would cover their official capacity intentional tort claims against Carter. However, they make two arguments that waiver has occurred. The first of these is that immunity has been waived by the statutorily required purchase of a bond by the Carter. All sheriffs in North Carolina are required to purchase such bonds. N.C. Gen.Stat. 162-8. Not only this, but "[e]very person injured by the neglect, misconduct, or misbehavior in office of any clerk of the superior court, register, surveyor, sheriff, coroner, county treasurer, or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds." N.C. Gen.Stat. 58-76-5. Such suits can be maintained not just for the actions of the sheriffs themselves, but also based on the actions of their deputies while acting under color of law. Thus, the statutory bond works as a waiver of the governmental immunity of sheriffs and their deputies where, as here, the surety is joined as a party. *Messick v. Catawba County, North Carolina*, 110 N.C.App. 707, 714-15, 431

S.E.2d 489 (1993), *implied overruling recognized* on *other grounds, Boyd v. Robeson County,* 169 N.C.App. 460, 621 S.E.2d 1 (2005). This waiver covers the torts of assault and battery. *State ex rel. Cain v. Corbett,* 235 N.C. 33, 69 S.E.2d 20 (1952).

For the reasons just set out, it is clear that Carter's governmental immunity for plaintiffs' official capacity tort claims has been waived under North Carolina law by the purchase of the statutory bond. Indeed, Carter has not denied that immunity is waived to the extent that the bond exists. What he has argued is that a separate insurance policy purchased by Moore County, and covering employees of the Sheriff's Department, does not cover intentional torts. This assertion is grounded in a provision in the policy that excludes:

> any claim for damages arising out of fraudulent, dishonest, or criminal behavior, including the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the Participant, and claims or injury arising out of the willful, intentional or malicious conduct of any Covered Person;

(Wyatt Aff. Ex. A. § 5 Subpart F(4))[7]

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7. The applicable parts of the exclusion were quoted correctly in Carter's brief, but incorrectly in plaintiffs' response brief and Carter's reply brief where the language quoted was mistakenly typed as "and claims for injury" rather than "and claims or injury." It is not clear, but this misquotation of the policy may have led to some of the disagreement between the parties.

In one sense, Carter's argument is irrelevant at this point because waiver of his governmental immunity has already occurred due to the existence of the statutory bond. All of the tort claims against him in his official capacity will go forward and he will need to mount a defense against them. Total dismissal of the claims cannot occur. What the argument is really aimed at is determining the extent of the waiver.

Unfortunately, because the waiver or non-waiver is based on interpretation of an insurance policy, Carter's argument actually seeks the equivalent of an advisory opinion concerning whether insurance coverage exists. The opinion would be advisory because the party most affected by the decision, the insurance company, is not represented before the Court and has not had an opportunity to argue its interpretation of the policy provision. For this reason, the Court will not address the coverage issue, but will leave a final decision on the matter for such time, should it be necessary to make the decision.

C. Claims Against Fidelity Mutual

Fidelity Mutual also seeks summary judgment. It does so on the ground that plaintiffs cannot show that Butler committed any tort for which Fidelity may be liable as the surety on Carter's statutory bond. Of course, Butler's commission of the alleged torts is an issue for trial and Fidelity's motion for summary judgment will be denied.

IT IS THEREFORE ORDERED that Randall Butler's motion for summary judgment (docket no. 50) be, and the same hereby is, granted with respect to plaintiffs' claims that he violated their rights under the Fourth Amendment when he pulled over the vehicle in which they were riding and denied in other all other respects.

IT IS FURTHER ORDERED that defendants Lane Carter and Fidelity and Deposit Company of Maryland's motion for summary judgment (docket no. 48) be, and the same hereby is, granted as to plaintiffs' claims under 42 U.S.C. § 1983, granted as to plaintiffs' direct negligence claims against defendant Carter, and denied as to plaintiffs' other state law tort claims.

s/ Russell A. Eliason
United States Magistrate Judge

July 12, 2006

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED DECEMBER 10, 2007

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-1929
(1:04-cv-00151)

CODY HASTINGS MASSASOIT, Executor for Tallas Hastings Tomeny, Deceased; STEPHEN PHELPS,

Plaintiffs - Appellees

v.

LANE CARTER, Sheriff, In his official capacity; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; RANDALL BUTLER, Deputy, In his individual and official capacity,

Defendants - Appellants

and

MOORE COUNTY SHERIFF DEPARTMENT,

Defendant

Appendix C

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Shedd, Senior Judge Hamilton and District Judge Wilson.

For the Court

/s/ Patricia S. Connor, Clerk